Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

SAMMY'S OF MOBILE, ET AL., Petitioners,
v.
CITY OF MOBILE, ALABAMA, Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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December 18, 1998

QUESTIONS PRESENTED

1. Whether a local government can adopt an ordinance which is clearly content-based and prohibits expression only as to forms of conduct that are inherently and traditionally communicative?

2. Whether a local government can adopt a content-neutral or content-based form of legislation with a complete failure to establish either the existence or advancement of a legitimate governmental interest, in direct conflict with this Court's decision in *44 Liquormart v. Rhode Island, infra.*?

3. Whether a local government may condition the conferral of a benefit on the surrender of a constitutional right in order to engage in First-Amendment protected activities in direct conflict with the "doctrine of unconstitutional conditions" set forth in this Court's decision in *Perry v. Sindermann, infra.*?

LIST OF PARTIES

The parties to the proceedings below were the Petitioners, Sammy's of Mobile, Ltd., an Alabama Limited Partnership, Sammy's Management Company, Inc., an Alabama Corporation, J & B Social Club, # 1, Inc., d/b/a The Candy Store, Jennifer Q. Bodiford, and the Respondent, the City of Mobile, Alabama.

There are no entities to report or list pursuant to Supreme Court Rule 29.1.

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On Petition for Writ of Certiorari
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PETITION FOR WRIT OF CERTIORARI

Petitioners, Sammy's of Mobile, Ltd., et al., respectfully pray that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 140 F.3d 993 (11th Cir. 1998) (App., *infra*, 1a – 34a). The denial of rehearing and rehearing en banc is reported as a table decision at 156 F.3d 188 (11th Cir. 1998) (App., *infra*, 77a – 78a). The opinion of the district court granting the City of Mobile's Motion for Summary Judgment is reported at 966 F.Supp. 1131 (S.D. Ala. 1996) (App., *infra*, 35a – 52a). The opinions of the district court denying Petitioners' Motions for Preliminary Injunction are reported at 920 F.Supp. 1241 (S.D. Ala. 1996) (App., *infra*, 53a – 64a) and 928 F.Supp. 1116 (S.D. Ala. 1996) (App., infra, 65a –76a).

JURISDICTION

The court of appeals entered its judgment on May 8, 1998 (App., *infra*, 1a – 34a). A timely petition for rehearing and rehearing en banc was denied on August 5, 1998 (App., *infra*, 77a – 78a). A timely application for extension of time within which to file a petition for a writ of certiorari to and including December 18, 1998, was granted by Justice Anthony M. Kennedy on November 4, 1998 (App., *infra*, 79a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment I

Congress shall make no law ... abridging the freedom of speech ...

Amendment V

The Fifth Amendment to the Constitution of the United States provides in pertinent part: "...nor shall any person be ... deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment IV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protections of the laws.

Amendment XXI, Section 2

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof is hereby prohibited.

UNITED STATES CODE

42 U.S.C. Section 1983

42 U.S.C. § 1983 provides in pertinent part: "Every person who, under color of state law…subjects, or causes to be subjected, any citizen…to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law…" 42 U.S.C. § 1983.

ORDINANCES ENACTED BY
THE CITY OF MOBILE, ALABAMA

Ordinance 03-003, Ordinance of the City of Mobile, Alabama, is reprinted and included in its entirety in the Appendix (App., *infra*, 80a – 82a).

STATEMENT OF THE CASE

Petitioners, Sammy's of Mobile, Ltd., an Alabama Limited Partnership; Sammy's Management Company, Inc., an Alabama Corporation, J & B SOCIAL CLUB, # 1, INC., d/b/a The Candy Store and Jennifer Q. Bodiford, are the entities that are involved with two businesses, "Sammy's" and "The Candy Store," both of which offer

entertainment to the public in the form of recorded music and exotic dance performances in which the expressive content of the performances places an emphasis on sexual expression and the interest in human sexuality that all human beings possess to a greater or lesser degree.

As an integral part of the Petitioners' businesses, each had obtained an "ABC" license and approval by the City of Mobile for such license to "dispense alcoholic beverages, spirits brewed, malt beverages, and vinous beverages." Quite simply, "Sammy's" and "The Candy Store" were what is colloquially referred to as "topless dancing clubs" serving alcohol.

Both "Sammy's," and "The Candy Store," filed all appropriate applications, and obtained approvals and entitlements from the City of Mobile to operate alcoholic beverage establishments. At the time of the investigation by the City of Mobile of the applications filed by "Sammy's," the "topless dancing" nature of the business was made known to the City, the Mayor, and the Council.

"Sammy's" ABC license was approved and issued on March 15, 1993. In reliance on the approval of the above-referenced application and the issuance by the State of Alabama of the ABC license, "Sammy's" bought the property and constructed a new building at 3106 Airport Boulevard, Mobile, Alabama, with the specific intent of creating an upscale topless dance club that included the integral component of offering the responsible consumption of alcoholic beverages in conjunction with the presentation of exotic dance performances. "Sammy's" spent approximately $1,000,000.00 to purchase the property and construct the facility described above, with the assistance of a loan from the Small Business Administration.

The subject businesses operated without incident for several years, until on February 6, 1996, the City Council of the City of Mobile passed Ordinance No. 03-003, which purportedly banned "nudity and sexual conduct and depiction thereof, coupled with alcohol in public places," but actually only made it "unlawful for any manager, officer, agent, servant, employee, or person in charge of any establishment...licensed to sell spirituous or vinous liquors...knowingly to exhibit, suffer, allow, permit, engage in, participate in, or be connected with, *any motion picture, show, performance or other presentation upon a licensed premises, which...depicts nudity or sexual conduct or any simulation thereof.*" (App., *infra*, __ a – __ a). (Emphasis added).

The Ordinance was first circulated to members of the City Council on February 1, 1996. At that time, it was not on the agenda for the next scheduled meeting of February 6, 1996. The Ordinance was then added to the Council's agenda on Friday, February 2, 1996. There was no publication of the agenda nor any notice provided to the public until Sunday, February 4, 1996, when the City Council's agenda was published in the local newspaper simply as a courtesy and not as a requirement of any state or local procedure. The principals of "Sammy's" did not learn of the Ordinance until the morning of Tuesday, February 6, 1996.

On February 6, 1996, a Pre-council meeting was held, at which time the City of Mobile's Director of Public Safety, ultimately stated that there was no evidence to show any significant law enforcement problem at any of the subject businesses, nor had there been any exceptional experience of criminal activity at any of the types of businesses sought to be regulated by the subject Ordinance. Nonetheless, when the City Council met, extensive public criticism was expressed as to the existence of businesses that would combine topless

entertainment with the service of alcoholic beverages, and the Ordinance was adopted.

Subsequent to the adoption of the Ordinance, which was deemed to take effect on February 28, 1996, "Sammy's" filed a civil action in the Circuit Court of Mobile County, Alabama. The state civil action challenged the Ordinance on several substantive grounds, including a deprivation of "their rights to freedom of speech, expression, association, privacy, access to courts, petition, equal protection and due process." Also alleged were deprivation of rights secured by the First, Fifth and Fourteenth Amendments to the Constitution. The state action also sought a temporary restraining order against the enforcement of the subject ordinance.

On February 26, 1996, the City of Mobile, through its Counsel, filed and served a Notice of Removal of the action to the United States District Court for the Southern District of Alabama. "Sammy's" did not challenge the removal to federal court.

During the same period of time, on March 12, 1996, "The Candy Store" filed a separate Complaint in the United States District Court for the Southern District of Alabama, Case No.: 96-0246-BH-S, naming the City of Mobile, the City Clerk, City Council Members, the Police Chief and Mayor, both in their official capacity and individually, as defendants. On March 13, 1996, the Court set a hearing for March 19, 1996. The individual Defendants filed Motions to Dismiss and supporting legal memorandum, to which responses were filed by "The Candy Store."

At the close of the Hearing, Counsel for "The Candy Store" summarized the constitutional challenges against Ordinance 03-003, and in response, Counsel for the City of Mobile emphasized that since the Ordinance

was adopted under the authority of the Twenty-First Amendment, it was virtually insulated from any constitutional challenge.

The result of the two separate cases was identical. On March 6, 1996, the district court entered an order denying the "Sammy's" motion for temporary restraining order and motion for preliminary injunction. This decision was published as *Sammy's of Mobile, Ltd., v. City of Mobile*, 928 F. Supp. 1116 (S.D. Ala. 1996) (App., *infra*, 65a – 76a). Shortly thereafter, on March 26, 1996, the district court issued an order denying "The Candy Store's" requested relief, dismissing the complaint against all individual defendants and denying the motion for preliminary injunction. This decision is reported as *J & B. Social Club, No 1, Inc., v. City of Mobile*, 920 F. Supp. 1241 (S.D. Ala. 1996) (App., *infra*, __ a – __ a).

Subsequent to the district court's denials of injunctive relief, the City of Mobile sought to consolidate the two cases, which was approved by the district court.

After a variety of other procedural motions and orders, the City of Mobile filed answers to "Sammy's" and "The Candy Store's" complaints. While the consolidated cases progressed, this Honorable Court issued its decision in *44 Liquormart, Inc., v. Rhode Island*, 517 U.S. 484, 116 S.Ct 1495, 134 L.Ed.2d 711 (1996).[1] This Court held that the Twenty-First

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[1] In *44 Liquormart,* this Court reversed a court of appeals decision which held that the State of Rhode Island had shown "inherent merit" in a state law banning the advertisement of retail liquor prices. Rejecting the idea that the Twenty-First Amendment could in some way qualify the First Amendment prohibition against laws abridging freedom of speech, the Court held that such a ban was unconstitutional because it did not directly advance the state's asserted interest in the promotion of temperance and was more extensive than necessary to serve that interest. The Court held that the Twenty-First Amendment does not license the state to ignore their

Amendment does not qualify the constitutional prohibitions against laws abridging the freedom of speech embodied in the First Amendment.

Because the City of Mobile's arguments and the district court's reasoning were significantly impacted, if not nullified, by *44 Liquormart*, both "Sammy's" and "The Candy Store" filed (separate) motions for summary judgment on August 22, 1996. The City of Mobile also filed a motion for summary judgment. On October 2, 1996, the district court issued an order granting the City of Mobile's motion for summary judgment, holding that (1) the ordinance furthered a legitimate governmental purpose and was narrowly drawn and, thus, did not violate the First Amendment, and (2) the ordinance did not violate the equal protection clause, reported at 966 F.Supp. 1131 (S.D. Ala. 1996). (App., *infra*, __ a – __ a).

The consolidated case was dismissed and judgment was entered for the City of Mobile. An appeal was filed with the Eleventh Circuit Court of Appeals on October 30, 1996.

The major points on appeal were that, as a threshold consideration, the district court erred in granting summary judgment in favor of the City of Mobile because of the many "genuine issues of material fact." It was also asserted that the adoption of the City of Mobile's Ordinance No. 03-003 was accomplished with virtually

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other obligations under other constitutional provisions. Disavowing *California v. La Rue*, 409 U.S. 109 (1972), the Court called into question a vast array of exotic dance legislation predicated solely on the Twenty-First Amendment. Using a commercial speech analysis and considerations of "a reasonable fit between legislation and its goal," the Court resurrected the *O'Brien* test (*United States v. O'Brien*, 391 U.S. 367 (1968)) in areas of legislation where the regulation of alcohol would have insulated the legislation from any constitutional challenge.

no notice to any affected business owner and, despite testimony by the City of Mobile's Director of Public Safety that the businesses in question did not engender any significant demand for police service, or otherwise cause "adverse secondary effects," the subject ordinance was adopted entirely under the authority of the Twenty-First Amendment, with no substantial, competent evidence to support its adoption.

At the time the ordinance was adopted, it was true that great deference was given to regulations adopted under the authority of the Twenty-First Amendment, however, the intervening decision of *44 Liquormart, Inc. v. Rhode Island, supra*, held by majority opinion of this Court that the use of the Twenty-First Amendment could not, by itself, justify restrictions abridging the freedom of speech embodied in the First Amendment.

It was is respectfully submitted that the District Court erred in granting summary judgment to the City of Mobile, since there was clearly a genuine issue as to material fact regarding the predicate for the adoption of Ordinance 03-003, as well as whether the City of Mobile could carry the burden of showing that the proposed restrictions contained in Ordinance 03-003 would advance any alleged governmental interest "to a material degree."

This argument was buttressed by the argument that, since the ordinance only applied to forms of conduct that were *inherently* communicative, such as "any motion picture, show, performance, or other presentation," the legislation was clearly content-based, and targeted only at traditionally expressive behavior. Additionally, it was argued that the ordinance violated the doctrine against "unconstitutional conditions" by forcing the Petitioners, and others similarly situated, to sacrifice the presentation of their desired form of expression (i.e., exotic dancing), if they wanted to enjoy the benefits conferred by their

alcoholic beverage licenses *or* give up those benefits in order to avoid any "burden" on the exercise of their First Amendment rights.

The court of appeals, by a two judge majority, held that the ordinance satisfied First Amendment restrictions on the regulation of expressive conduct. Ultimately, the majority rejected the argument adopted by the dissent that, since the ordinance restricted only "traditionally expressive activities," it was a content-based restriction that "must be evaluated under searching judicial scrutiny," and applied the "intermediate level" of scrutiny enunciated in the four-part test of *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

In their opinion, the majority identified the fact that the ordinance imposed on the Petitioners a choice between utilizing their liquor licenses presenting sexually expressive First Amendment protected performances. Regrettably, it was stated that "the Supreme Court has long upheld ordinances such as Mobile's," citing *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), and a long line of cases which, as identified in the dissent, "after *44 Liquormart*...appear to lack precedential value."

The majority continued to analyze the challenged ordinance under what they termed the "*Barnes-O'Brien* test," a hybrid of the decisions in *O'Brien* and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 34 L.Ed.2d 504 (1991), a plurality decision in which this Court, analyzing a law of general application which embodied Indiana's "prohibition against complete nudity in public places" was used as the backdrop against which this Court recognized that "nude dancing is expressive conduct within the outer perimeters of the First Amendment, though...only marginally so." *Id.* at 566,

111 S.Ct. at 2460. Under this *Barnes-O'Brien* test, the majority apparently rejected the dissent's distinctions between the Indiana law of general application and Mobile's ordinance, which targeted only traditionally expressive activities. The majority also allowed an apparent "expansion" of the holding in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48, 106 S.Ct. 925, 929, 89 L.Ed.2d 29 (1986) (an adult entertainment *zoning* case silent on the issue of alcoholic beverages) by concluding that the district court had appropriately determined that Mobile's ordinance served a "substantial governmental interest" because the ordinance mimicked a concern that "nudity and alcohol" encouraged "undesirable behavior and is not in the interest of public health, safety and welfare." The circuit court also found that there was a "reasonable basis" for such a belief based on the "experience of other cities, studies done in other cities, caselaw reciting findings on the issue, as well as their own wisdom and common sense." (App., *infra*, 7a).

In actuality, the majority declined to recognize the fact that during the adoption of Mobile's Ordinance 03-003 there was no mention of the experience of other cities, studies done in other cities, case law reciting findings on the issue, nor any "wisdom and common sense" put forth, other than the testimony offered by the City of Mobile's Director of Public Safety indicating that there was *no evidence* to show any significant law enforcement problem at any of the subject businesses, nor had there been any exceptional experience of criminal activity at any of the types of businesses sought to be regulated by the subject ordinance.

Affirming the district court, the majority concluded that "Mobile is attempting to regulate the secondary effects of alcohol and nude dancing without prohibiting either. It does not seek to ban bars or nude dancing. Everyone can still buy a drink and watch nude

dancing in Mobile. They cannot, however, do both in the same place." (App., *infra*, 12a – 13a).

Petitioners agree with the dissent's analysis that the majority "fundamentally misapprehends the restrictions that the First Amendment imposes upon governmental power to regulate expression." The dissent recognized the merit of the argument that the ordinance violated the doctrine of unconstitutional conditions, quoting the well established proposition that "[e]ven though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right," citing both *Perry v. Sindermann*, 408 U.S. 593[, 597], 92 S.Ct. 2694[, 2697], 33 L.Ed.2d 570 (1972), and "relying on a host of cases applying that principle during the preceding quarter-century, the court explained that government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially his interest in freedom of speech.' *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513, 116 S.Ct. 1495, 1513, 134 L.Ed.2d 711 (1996) (internal citation omitted)." (App., *infra*, 14a).

The dissent criticized the majority's reliance on the dicta of *44 Liquormart* that, even though *LaRue* was disavowed in so far as it relied on the Twenty-first Amendment, this Court held, "we are now persuaded that the Court's analysis in *LaRue* would have led to precisely the same result if it had placed no reliance on the Twenty-first Amendment." *44 Liquormart*, at 515, 116 S.Ct. at 1514. (App., *infra*, 17a).

The dissent also criticized the majority's use of the so-called "*Barnes-O'Brien* test" by concluding that *Barnes* did not control "the case *sub judice*" because the statute challenged in *Barnes* did not single out one form

of expression for disfavored treatment and was a law of general application "focused on nudity *simpliciter* and not on forms of expressive conduct or the messages they convey." (App., *infra*, 21a).

The dissent identified that the City of Mobile ordinance applied only to forms of conduct that were inherently and traditionally communicative and noted the distinction between generally applicable, content neutral regulations, and those prohibiting conduct " '[p]recisely because of its communicative attributes.' *Cf. Int'l Eateries of Am. v. Broward County*, 941 F.2d 1157, 1161 (11th Cir.1991)...(quoting *Barnes*, 501 U.S. at 577, 111 S.Ct. at 2466 (Scalia, J., concurring in the judgment) (emphasis omitted)), cert. denied, 503 U.S. 920, 112 S.Ct. 1294, 117 L.Ed.2d 517 (1992). A regulation that by its terms prohibits only traditional forms of expression cannot be said to be unrelated "to the suppression of free expression within the meaning of *O'Brien* ... [and thus is] outside of *O'Brien*'s test altogether." *Texas v. Johnson*, 491 U.S. 397, 410, 109 S.Ct. 2533, 2543, 105 L.Ed.2d 342 (1989)." (App., *infra*, 21a – 22a).

The dissent also identified the distinction that the Eleventh Circuit had repeatedly distinguished between regulations proscribing nudity *per se,* including "general proscriptions on nudity in particular fora, from regulations targeted at expressive conduct." *Citing Grand Faloon Tavern, Inc. v. Wicker*, 670 F.2d 943 (11th Cir.1982), in which the Eleventh Circuit upheld a city ordinance banning nudity on premises where alcohol was served.

The dissent noted that:

> "[t]he ordinance, unlike the one before us now, did not single out nudity in "any motion picture, show, performance, or other presentation," but rather simply banned all

> nudity in establishments offering alcohol for sale. *See id.* at 944 n. 2. Because the regulation thus was not targeted at traditionally expressive behavior, we applied *O'Brien* scrutiny and upheld the ban. In *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir.1985), however, we invalidated a ban almost identical to that in *Grand Faloon* because, unlike the ban in *Grand Faloon*, which was supported by a legitimate and substantial government interest in regulating activities likely to lead to breaches of the peace, the record demonstrated that the city's motive was to restrict expression. 759 F.2d at 855-56. Both cases addressed regulations that facially banned all nudity in establishments licensed to serve alcohol, rather than solely nudity in the course of traditionally expressive forms of conduct. *See Krueger*, 759 F.2d at 853-54 n. 3; *Grand Faloon*, 670 F.2d at 944 n. 2.
>
> Ordinance 03-003 on its face singles out nude entertainment and thus the "erotic message conveyed" by that conduct. *Barnes*, 501 U.S. at 570, 111 S.Ct. at 2463." (App., *infra*, 23a – 24a).

The dissent also identified a significant distinction between the cases evaluating the validity of *zoning ordinances* (*Renton*, *supra*, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), and *Int'l Eateries, supra.),* and emphasized the fact that those ordinances were aimed at "secondary effects" and were permissible applying "time, place and manner scrutiny," because, unlike the Mobile ordinance (which categorically banned nude dancing in establishments that served alcohol), the zoning ordinances

allowed "reasonable alternative avenues of communication" for those businesses regulated in the zoning context.

The dissent opined:

> Indeed, zoning regulations are amenable to time, place, and manner scrutiny at least in part because, although they restrict the locations available for a given use, they generally leave some areas open for the disfavored use. *See Renton*, 475 U.S. at 54, 106 S.Ct. at 932 ("[The City has] sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theaters from locating in other areas. This, after all, is the essence of zoning."); *Young*, 427 U.S. at 71 n. 35, 96 S.Ct. at 2453 n. 35.
>
> Unlike the zoning ordinances upheld in *Young*, *Renton*, and *International Eateries*, which preserved for adult entertainment "ample, accessible real estate," *Renton*, 475 U.S. at 53, 106 S.Ct. at 932, the City of Mobile's regulation prohibits establishments that wish to serve alcohol and present nude dancing from operating anywhere. Of course, as the City and the majority point out, appellants are free to provide nude dancing at their current locations as long as they are willing to forego the privilege of serving alcohol. (App., *infra*, 28a).

Finally, the dissent identified the fact that the City of Mobile made no showing as to the factual basis for its articulated concerns and the motivation for passage of the

ordinance beyond the conclusions stated in the ordinance itself, a showing insufficient to justify an infringement on protected expression. This lack of evidence, and the fact that such "mere assertions" as those contained in the City of Mobile's ordinance, unsupported by any legislative findings, were clearly insufficient to justify a regulation that, by its own terms, prohibited only conduct that was protected by the First Amendment. (App., *infra*, 32a – 33a).

Ultimately, the dissent identified the unconstitutional characteristics of Ordinance 03-003. The fact that it mandated that the conferral of a benefit to utilize a liquor license could not be conditioned on the surrender of a constitutional right, the fact that it was adopted solely under the auspices of the Twenty-first Amendment (a view clearly discredited under *44 Liquormart*), the fact that it was aimed solely at nudity contained *only* in traditionally expressive forms of conduct, and the fact that the ordinance was adopted with absolutely *no showing or evidence* to support the infringement on protected activity, all clearly established that the ordinance was an unconstitutional, content-based regulation.

REASONS FOR GRANTING THE WRIT

Granting the Writ in the instant case will allow this Court to provide direction and define the appropriate application of the "secondary effects doctrine" in a way that will prevent any possible abuse of cherished First Amendment rights. It will also enable this Court to address the conflict among circuits as to the necessity of the government to establish and/or advance a legitimate governmental interest as a pre-requisite to imposing legislation that ultimately restricts speech.

For the past twenty years, both the Federal and the State courts have been inundated with cases involving challenges to both local and state legislation restricting the operation of adult entertainment businesses. Initially, most of these cases dealt with zoning regulations which placed such businesses in specific locations and attempted to buffer the community from the so-called "adverse secondary effects" of such businesses. *See Young, supra*, and *Renton, supra.*

In addition to these types of regulations, significant issues have arisen regarding licensing legislation which impacted the opportunity to engage in the unfettered exercise of free speech. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596 (1990). An added dimension has also emerged and ultimately intersected this area of the law because of issues involving adult entertainment combined with alcoholic beverage regulation. This line of cases began with *California v. LaRue, supra*, and, even though not an adult entertainment case, clearly culminated in *44 Liquormart, supra.*

The principle which underscores all these issues was most succinctly stated in *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975), where this Court held that "when the government, acting as a censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others," the First Amendment places strict limits on the exercise of such governmental power. Indeed, such considerations have forced the courts to struggle with defining appropriate methods to

"categorize" speech in order to properly evaluate the appropriate scope of any legislation restricting speech.[2]

To further complicate this area of the law, once the speech itself is categorized, the regulation affecting speech must then be evaluated to determine whether it is "content-based" or "content-neutral."

Content-based laws restrict expression based on the message conveyed.[3] Presumptively unconstitutional, content-based laws must advance a compelling governmental interest in the least restrictive means.[4] Content-neutral laws must satisfy a less exacting constitutional standard: they must be "narrowly tailored to serve a significant governmental interest, and... leave open ample alternative channels for communication." [5]

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2 John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482 (1975); Frederick Schauer, *Categories and the First Amendment: a Play in Three Acts*, 34 Vand. L. Rev. 256 (1981).

3 *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994) ("As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based.")

4 *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid.") (citation omitted)); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (noting that regulation of "the content of constitutionally protected speech" is permissible "in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest"). See also *Police Dep't v. Mosley*, 408 U.S. 92, 99 (1972) (indicating through Justice Marshall that discrimination based on content was "never permitted").

5 *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *TK's Video, Inc. v. Denton County, Tex.*, 24 F.3d 705, 707 (5th Cir. 1994).

An added dimension to the evaluation of regulations affecting speech was the development of the "secondary effects doctrine." It was originally in the adult entertainment zoning cases that the secondary effects doctrine started to take shape. This doctrine arose as a justification to insulate what would otherwise be unconstitutional content-based regulations. Initially, the case law advancing the secondary effects doctrine based the doctrine on the "tests" enumerated in the symbolic speech case of *United States v. O'Brien*, *supra*.[6]

As this area of jurisprudence has advanced, several scholars have identified the fact that, despite its initially good intentions, the "secondary effects doctrine" has had a corrosive and potentially destructive impact on First Amendment law. Any regulatory objective, regardless of its impact on speech, can be asserted as a "secondary effect" ostensibly to support any regulation that ultimately restricts speech. Under this doctrine, a seemingly content-based law becomes analyzed as content-neutral if the speech regulation is "justified without reference to the content of the regulated speech."[7]

Primarily, the "secondary effects doctrine" developed on the theory that empirical evidence of the existence of adverse secondary effects would justify what would otherwise have been an unconstitutional, content-based regulation. Utilizing the *O'Brien* test, it was

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[6] Philip J. Prygoski, *The Supreme Court's "Secondary Effects" Analysis in Free Speech Cases*, 6 Cooley L. Rev. 1, 3-6 (1989) (stating that *United States v. O'Brien*, 391 U.S. 367 (1968), is "the source of the secondary effects analysis").

[7] *See* David L. Hudson, Jr., *The Secondary Effects Doctrine: the Evisceration of First Amendment Freedoms*, Washburn L.J., Vol. 37, No. 1, 55-94 (*quoting City of Renton v. Playtime Theatres*, 475 U.S. 41, 48 (1986)).

determined that the information generated by the City of Detroit, indicating that adult businesses had a "deleterious effect" on the City and its property values, satisfied the requirement that the regulation at issue in *Young* would "further an important or substantial governmental interest." [8]

Even from the beginning, the creation of the secondary effects doctrine was the subject of major criticism. In the dissent in *Young*, Justice Stewart termed the decision as an "aberration" in this Court's First Amendment jurisprudence[9] and accused the Court of "[riding] roughshod over cardinal principles of First Amendment law." [10] Legal commentators characterized the Court's decision as "the most dramatic departure from content-neutrality" [11] and deplored the Court's casting of a content-based law as content-neutral.

These issues raged for several years when, ultimately, this Court issued its decision in *Barnes v. Glen Theatre*. The *Barnes* case resulted in eight of nine Justices recognizing that exotic dancing was a form of expressive conduct deserving of First Amendment protection. The

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[8] Even this justification has troubled many scholars. *See* William C. Kelly & Jeannette A. Remetich, *Town of Islip v. Caviglia: "Secondary Effects" – Censorship in Disguise*, 5 J. Legal Commentary 149, 177-78 (1989) ("One cannot ignore the fact that the multitude of people look upon adult businesses with repugnance and loathsome distaste. Yet distaste for speech has never been a justification to suppress protected speech and should not be permitted to do so now.").

[9] *Young* at 87 (Stewart, J., dissenting).

[10] *Id.* at 85-86.

[11] Melvin Nimmer, *Nimmer on Freedom of Speech* § 2.07 (1984).

entertainment was deemed to be "expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so." *Barnes*, 501 U.S. 560, 581. Undeniably, the *Barnes* decision was an extremely complex and, to many, confusing opinion, because, unlike the early adult entertainment *zoning* ordinances at issue in *Young* and *Renton,* this Court was analyzing a state-wide law of general application banning all nudity. This Court voted 5 to 4 in favor of the public indecency law at issue, however, of the five members who upheld the law, the decision was divided into three separate and distinct opinions.

Unfortunately, the *Barnes* decision has proven to be extremely complex in its application, and has led to a vast array of differing conclusions by both federal and state courts applying what they felt to be the "holding" of the case. One federal appeals court has compared understanding the *Barnes* decision to "reading tea leaves." *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 134 (6th Cir. 1994). Some decisions, relying on *Barnes*, have even allowed municipalities to restrict First Amendment rights without requiring a showing of *any* empirical evidence, either local or from elsewhere, articulating any "adverse secondary effects" in order to support what would otherwise be an unconstitutional content-based regulation.[12]

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[12] Justice Souter, in his concurrence in *Barnes*, stated, "I do not believe that a State is required affirmatively to litigate this issue repeatedly in every case." This complete elimination of any "burden" on the part of the government to justify regulations which clearly ultimately restrict the freedom of speech has been adopted by numerous cases, including *Di Ma Corp. v. City of St. Cloud*, 562 n.W.2d 312, 321 (Minn. Ct. App. 1997), and most notably, the *Sammy's* case at issue in the instant petition.

While the analysis of adult entertainment regulations under this "relaxed" burden has apparently eliminated the necessity for any local government to "articulate and support" any alleged governmental interest, under the authority of the *Sammy's* case at issue herein, there is ultimately *no* requirement that a regulation be justified by a showing that it both addresses and furthers an important or substantial governmental interest.[13]

The instant case brings this issue to "critical mass," because of the fact that the evaluation of the legislation therein invoked an analysis of both *Barnes* and *44 Liquormart*. The apparent trend of eliminating the burden of the government to establish either a legitimate or substantial governmental interest, or to establish the advancement of that interest, was clearly in sharp contrast to the requirement to do so in the arena of commercial speech.

In the *44 Liquormart* decision, this Court invalidated prior decisions which seemed to suggest that the Twenty-first Amendment lent an added presumption in favor of the validity of regulations restricting otherwise protected speech, particularly when it was intertwined with the regulation of alcoholic beverages.

44 Liquormart was also the subject of multiple opinions, however, the decision clearly supported the

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[13] The slippery slope upon which this burden has been sliding for the last several years was originally, and appropriately, seen as repugnant to the constitution: "However, it is not enough for a local government to simply articulate an interest in preventing neighborhood blight; it must be prepared both 'to articulate and support,' a reasoned and significant basis for its zoning decisions." *Schad v. Borough of Mt. Ephraim*, 452 U.S. 67, 101 S.Ct. 2176 (1981) (Blackmun, concurring) (emphasis added).

proposition that "a commercial speech regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. For that reason, the state bears the burden of showing, not merely that its regulation will advance its interest, but also that it will do so to a material degree." *44 Liquormart,* at __ US ___, 116 S.Ct. at 1509.

The reason the instant case is so important is that it provides this Court with an opportunity to define the limits of the "secondary effects doctrine," and to provide the guidance necessary for the proper understanding and appropriate application of this Court's decisions in *Barnes v. Glen Theatre, supra,* and *44 Liquormart v. Rhode Island, supra.*

Such analysis would resolve the current split in the circuit courts as to the necessity of establishing a factual basis for any articulated concerns or alleged governmental interests, and the motivation for adopting regulations, beyond the mere conclusions stated in the legislation itself. In addition to resolving these conflicts, this Court can ensure that any conflict in the instant case with the decisions of this Court can be corrected. Most importantly, however, the issues in the instant case are fundamental and recurrent.

The Framers of the Constitution would have vigorously protested and rejected any First Amendment jurisprudence which allowed for either content-based or content-neutral regulations which sought to justify restrictions on speech under the "secondary effects doctrine." The Framers would have feared that, if not properly limited, such restrictions could be used to censor virtually *any* objectionable speech.

Granting the Petition in the instant case will allow an analysis and a definition of this issue that can provide

appropriate guidelines to prevent abuse of cherished First Amendment rights, an issue always of significant national importance.

I. THE CIRCUIT COURTS ARE DRAMATICALLY SPLIT AS TO THE NECESSITY FOR LOCAL GOVERNMENTS TO ESTABLISH AND SUPPORT A "LEGITIMATE OR SUBSTANTIAL GOVERNMENTAL OBJECTIVE" WHEN ENACTING LEGISLATION AFFECTING SPEECH.

Basic to the arguments presented in this Petition is the fact that exotic performance dancing is a protected form of expression under the First Amendment, applicable to the states through the Fourteenth Amendment. Any judicial consideration of any Ordinance, as used in the instant context, must by necessity be guided by the constitutional standards applied to state control over such expression.

Under any analysis, it is absolutely critical to remain cognizant that this case involves exotic and/or performance dancing, a form of expression undeniably protected by the First Amendment. *Barnes v. Glen Theatre*, 501 U.S. 560 (1991); *Redner v. Dean*, 29 F. 3d 1495 (11th Cir. 1994), *cert. den.*, 115 S.Ct. 1697 (1995).

From the earliest decisions dealing with the regulation of adult entertainment businesses, it was established that the legislation at issue could only be justified if it regulated or addressed a legitimate governmental interest, or the prevention of the so-called "adverse secondary effects" allegedly engendered by adult entertainment establishments. *Young v. American Mini Theatres*, 427 U.S. 50 (1976), *Young*; *Renton, supra*. A requirement of this concept was that these adverse

secondary effects be established through competent, substantial evidence. *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir. 1985); *Leverett v. City of Pinellas Park*, 775 F.2d 1536 (11th Cir. 1985); *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir. 1982).

Indeed, in upholding the ordinance at issue in *Renton*, this Court held that, "the First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities so long as whatever *evidence* the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *City of Renton v. Playtime Theatres, Inc.* 475 U.S. 41, 53, 106 S.Ct. 925, 931 (1986) (Emphasis added).

In earlier cases, it was held that it is the character of the right, not of the limitation which determines the level of scrutiny to be given the review of any legislation impinging a First Amendment right. *See Thomas v. Collins*, 323 U.S. 819 (1945). The modern trend, however, as established in the earlier discussion for the reasons for granting the writ, *supra*, shows there is now an unfortunate level of uncertainty as to the burden of the government to establish both the existence of a legitimate governmental interest to support any restrictions impacting speech, and the showing that any such restrictions advance a legitimate governmental interest.

This vast array of differing conclusions by both federal and state courts applying what they felt to be the "holding" of the *Barnes* case was compared to "reading tea leaves." *Triplett Grille,* 40 F.3d 129, 134 (6th Cir. 1994). In that case, the court upheld the invalidation of the ordinance on overbreadth grounds, but indicated that the burden of any proof of secondary effects was vitiated

by Justice Souter's opinion in *Barnes. Triplett Grille* at 133-135.

Likewise, in *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 408-411 (6th Cir. 1997), the court expressed no concern that there was no evidence developed prior to the adoption of the legislation at issue to establish the existence of adverse secondary effects. *Id.* at 410. The Third Circuit reached an entirely different conclusion in *Phillips v. Borough of Keyport*, 107 F.3d 164 (3rd Cir. 1997), which held that:

> When a legislative body acts to regulate speech, it has the burden, when challenged, of showing either (1) that its actions serves a compelling state interest which cannot be served in a less restrictive way, or (2) that its actions serve a substantial content-neutral state interest... it must come forward with... evidence... justifying... reasonable time, place and manner restrictions on speech. *Id.* at 172 – 173.

This position is also still the prevailing law in the Ninth Circuit, as set forth in *BSA, Inc. v. King County*, 804 F.2d 1104, 1108 (9th Cir. 1984) and *Acorn Investments v. City of Seattle*, 887 F.2d 219 (9th Cir. 1989). This, again, is in contrast to *Dodger's Bar and Grill, Inc. v. Johnson County Bd. Of County Commissioners*, 32 F.3d 1436 (10th Cir. 1994), which apparently eliminates any burden on the government to establish evidence necessitating any challenged restriction.

These conflicts are clearly complicated by the decision in *44 Liquormart*, since in that case, and its significant progeny,[14] the holding is clear that *no*

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[14] *SOC, Inc. v. County of Clark*, 152 F.3d 1136 (9th Cir. 1998), *Miller v. Stuart*, 117 F.3d 1376 (11th Cir. 1997), and numerous other cases adopt the necessity of showing that any challenged regulation is

commercial speech regulation would be sustained if it provided only ineffective or remote support for the government's purpose and, for that reason, the state would bear the burden of showing "not merely that its regulation will advance its interest, but also that it will do so 'to a material degree.' " *Id.* at 1509, citing *Edenfield*, 507 U.S. 761, 771, 113 S.Ct. 1792, 1800-1801 (1993), and *Rubin v. Coors Brewing Co.*, 514 U.S. ___, 115 S.Ct. 1585, 1591 (1995). At least one court has evaluated adult entertainment in the "commercial speech context." (*MD II Entertainment, Inc. v. City of Dallas, Texas*, 28 F.3d 492 (5th Cir. 1994)), and another court has *significantly* criticized restrictions on adult entertainment by questioning whether such restrictions can ever advance a legitimate governmental interest under appropriate scrutiny. *See Nakatomi Investments, Inc., v. City of Schenectady*, 949 F. Supp 988 (N.D.N.Y. 1997).

As established by the prior discussion, the circuit courts are in disarray as to how different types of speech should be categorized to help formulate an appropriate level of scrutiny for the evaluation of any regulations restricting same. Clearly, in an area which is as precious and vital to this country as the First Amendment, such a divergence of authority demands that some guidance be provided to the circuit courts in order to ensure a level of fairness and consistency to their decision making process. The secondary effects doctrine must be reconciled with the recent decisions evaluating restrictions on commercial speech, otherwise, this country is in grave danger of allowing the very types of content-based restrictions on speech most loathed by the Framers of the Constitution.

II. THE *SAMMY'S* DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT.

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justified only through an evidentiary showing of the existence of a legitimate governmental interest and the advancement thereof.

As intimated in the previous section, the circuit court's decision in the case *sub judice* is in direct conflict with all previously cited cases requiring the establishment of evidence to support the existence of a legitimate governmental interest in regard to any regulation affecting speech. Without restating these arguments, it is clear that the majority in the *Sammy's* decision rejected any legitimate guidance that might be provided by the *44 Liquormart* decision.

In addition to this, as recognized in the dissent:

> [T]he majority's reasoning ignores the well-established proposition that:
>
> > '[e]ven though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right. In *Perry v. Sindermann*, 408 U.S. 593[, 597], 92 S.Ct. 2694[, 2697], 33 L.Ed.2d 570 (1972), relying on a host of cases applying that principle during the preceding quarter-century, the Court explained that government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially his interest in freedom of speech.'
>
> *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513, 116 S.Ct. 1495, 1513, 134 L.Ed.2d 711 (1996) (internal citation omitted). Although the City may regulate the sale or service of alcohol, it may not

> condition the conferral of a liquor license--to which appellants concede they are not constitutionally entitled--on the forfeiture of the right to engage in expressive behavior. Because the City authorizes the punishment, by fine or imprisonment, of licensees who "exhibit, suffer, allow, permit, engage in, participate in, or [are] connected with" one form of expressive behavior, the challenged ordinance imposes a significant burden upon First Amendment freedoms. (App., infra, 14a – 15a).

The dissent clearly identified that City of Mobile Ordinance 03-003 was a clear example of the violation of the doctrine forbidding unconstitutional conditions as a prerequisite to the enjoyment of otherwise available benefits. This concept was also adopted in a case directly on point, *G & V Lounge, Inc. v. Michigan Liquor Control Com'n*, 23 F.3d 1071 (6th Cir. 1994), and, in a recently decided Eleventh Circuit Case, *Miller v. Stuart*, 117 F.3d 1376 (11th Cir. 1997).

In the instant case, the majority's suggestion that, "Everyone can still buy a drink and watch nude dancing in Mobile. They cannot, however, do both in the same place," violates this Court's decision in not only *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, but also *Keyishian v. Board of Regents*, 385 U.S. 589, 606, 87 S.Ct. 675, 685, 17 L.Ed.2d 629 (1967) and *Sherbert v. Verner*, 374 U.S. 398, 404, 83 S.Ct. 1790, 1794, 10 L.Ed.2d 965 (1963).

CONCLUSION

Petitioners, Sammy's of Mobile, Ltd., et al., respectfully pray that this Court grant a writ of certiorari to review the judgment of the United States Court of

Appeals for the Eleventh Circuit in this case. Clearly, the issues involved in this action go far beyond the mere facts of the instant case, and provide this Court with the unique opportunity to reconcile the misapprehensions suffered by the many state and federal courts attempting to interpret the holdings in *Barnes v. Glen Theatre* and *44 Liquormart* in a way that does not lead to the absence of "equal justice under the law."

Clearly, the instant case could hinge on the simple approval of the well-reasoned dissent which concluded that since the ordinance at issue targeted only traditionally expressive forms of activity, it was clearly content-based and unconstitutional. Even if evaluated under a more deferential content-neutral context, it is clear that this Court can provide much needed guidance in an unsettled and controversial area of First Amendment jurisprudence by granting the instant petition for writ of certiorari.

Respectfully submitted,

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December 18, 1998

APPENDIX

SAMMY'S OF MOBILE, LTD., an Alabama Limited Partnership; Sammy's Management Company, Inc., an Alabama Corporation, Plaintiffs-Appellants,

v.

CITY OF MOBILE, a Body Corporate and Politic, Defendant-Appellee. J & B SOCIAL CLUB, # 1, INC., d.b.a. The Candy Store, Jennifer Q. Bodiford; et al., Plaintiffs-Appellants,

v.

The CITY OF MOBILE, ALABAMA, Defendant-Appellee.

No. 96-7073.

140 F.3d 993 (11th Cir. 1998)

United States Court of Appeals,

Eleventh Circuit.

May 8, 1998.

Before BIRCH, Circuit Judge, and HILL and KRAVITCH, Senior Circuit Judges.

HILL, Senior Circuit Judge:

The City of Mobile prohibits nude dancing in establishments licensed to sell liquor. Two clubs brought suit seeking an injunction prohibiting the City from enforcing its ordinance. The clubs claim the ordinance violates their rights under the First Amendment to the Constitution. The district court granted summary

judgment to the City. For the following reasons, we affirm.

I.

Ordinance 03-003[1] of the City of Mobile, Alabama provides:

> It shall be unlawful for any manager, officer, agent, servant, employee, or person in charge of any establishment within the City of Mobile or the police jurisdiction thereof, licensed to sell spirituous or vinous liquors or malt or brewed beverages under the laws of the State of Alabama, knowingly to exhibit, suffer, allow, permit, engage in, participate in, or be connected with, any motion picture, show, performance, or other presentation upon the licensed premises, which, in whole or in part, depicts nudity or sexual conducts or any simulation thereof.
>
> Any person, firm or corporation convicted for violating this ordinance shall be fined not more than $500.00 and sentenced to imprisonment for a period not exceeding six months, at the discretion of the court trying the case.[2]

The preamble to the ordinance provides:

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1 The ordinance was enacted on February 6, 1996.

2 The ordinance defines "nudity" as:

> [T]he showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the darkened area surrounding the nipple, or the depiction of covered male genitals in a discernibly turgid state.

> WHEREAS, the City Council of the City of Mobile, Alabama, finds and declares that nudity and sexual conduct and depiction thereof, coupled with alcohol in public places, encourages undesirable behavior and is not in the interest of the public health, safety, and welfare.
>
> WHEREAS, the Council has chosen to avoid the disturbances associated with mixing alcohol and nude dancing by means of a reasonable restriction upon establishments which sell spiritous or vinous liquors or malt or brewed beverages.
>
> NOW, THEREFORE, the Council adopts this Ordinance pursuant to the powers under the Twenty-first Amendment to the Constitution of the United States delegated to it by the State of Alabama. *Id.*

Prior to the enactment of the ordinance, Sammy's of Mobile, Ltd., (Sammy's), and The Candy Store were licensed to sell alcoholic beverages for on-premises consumption and offered topless female dancing. Sammy's surrendered its liquor license after the passage of the ordinance, and continues to offer topless, as well as totally nude, dancing. The Candy Store has not surrendered its license and continues to provide topless dancing. Although the City has not yet enforced the ordinance against The Candy Store, the City has expressed an intent to do so.

Sammy's filed suit against the City in Alabama state court seeking declaratory and injunctive relief, and the City removed the action to federal district court. The complaint alleges that the ordinance is unenforceable

under the doctrine of equitable estoppel and that it violates the free speech clause of the First Amendment, the takings clause of the Fifth Amendment, the equal protection clause, both the substantive and procedural guarantees of the due process clause of the Fourteenth Amendment, and the ex post facto clause.

The Candy Store filed suit in federal district court seeking injunctive relief and damages, alleging that the ordinance violates the First Amendment, the Fifth Amendment, and the equal protection clause of the Fourteenth Amendment and that the ordinance is unenforceable under the doctrine of res judicata.[3]

The two cases were consolidated and all parties moved for summary judgment. The district court granted summary judgment to the City on all claims. The court concluded that the ordinance does not offend the First Amendment under the four-part test of *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), and that plaintiffs' remaining claims lack merit. Sammy's and The Candy Store appeal, contending that the district court erred in holding that the ordinance does not offend the First Amendment or the due process and equal protection clauses of the fourteenth Amendment. We review the district court's grant of summary judgment de novo. *Gordan v. Cochran*, 116 F.3d 1438, 1439 (11th Cir.1997).

II.

The Supreme Court has long upheld ordinances such as Mobile's. In *California v. LaRue*, 409 U.S. 109, 114, 93 S.Ct. 390, 395, 34 L.Ed.2d 342 (1972), the Court approved, as a valid exercise of the general police power,

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[3] The district court denied both Sammy's and The Candy Store's motions for injunctive relief.

an ordinance prohibiting nude dancing where liquor was sold. The Court found the "conclusion, embodied in these regulations, that certain sexual performances and the dispensing of liquor by the drink ought not to occur at premises that have licenses was not an irrational one." *Id.* at 118, 93 S.Ct. at 397. Since then, many similar ordinances have been approved, including several in this circuit. *See New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981); *City of Newport v. Iacobucci*, 479 U.S. 1047, 107 S.Ct. 913, 93 L.Ed.2d 862 (1987); *Lanier v. City of Newton*, 842 F.2d 253 (11th Cir.1988); *Int'l Eateries of America v. Broward County*, 941 F.2d 1157, 1162 (11th Cir.1991); *Grand Faloon Tavern, Inc. v. Wicker*, 670 F.2d 943 (11th Cir.1982); *Cafe 207, Inc. v. St. Johns County*, 856 F.Supp. 641, 645 (M.D.Fla.1994), *aff'd per curiam*, 66 F.3d 272 (11th Cir.1995).

Although such ordinances regulate expressive conduct,[4] the Court has determined that they are content-neutral and should be reviewed under the intermediate level of scrutiny articulated in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 570, 111 S.Ct. 2456, 2462-63, 115 L.Ed.2d 504 (1991). Under this test, an ordinance is constitutional if: (1) the interest served is within the power of the government; (2) the regulation furthers that interest; (3) the interest served is unrelated to free expression; and (4) there is no less restrictive alternative. *O'Brien* at 377, 88 S.Ct. at 1679 (quoted in *Barnes*, 501 U.S. at 567, 111 S.Ct. at 2461). In *Barnes*, the Court applied this test in upholding Indiana's

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[4] The Supreme Court has recognized that nude dancing may have some expressive content. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566, 111 S.Ct. 2456, 2460, 115 L.Ed.2d 504 (1991).

prohibition on public nudity as applied to nude dancing. 501 U.S. at 570, 111 S.Ct. at 2462-63.

Recently, the Supreme Court has reaffirmed the precedential value of *LaRue* and the *Barnes-O'Brien* test. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996). Although the Court disavowed the idea expressed in a long line of cases, including *LaRue*, that the Twenty-first Amendment lends an added presumption in favor of the validity of regulation of otherwise protected speech when it is at the site of the sale of alcoholic beverages, the Court observed that "[e]ntirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations." 517 U.S. at 515, 116 S.Ct. at 1514. This power is located in the inherent police power of every state to regulate to promote public decency. *Id.*

The Court also reaffirmed that the *Barnes-O'Brien* intermediate level of review applies to such ordinances. *Id.* Under this test, the Court concluded, even after *44 Liquormart*, *LaRue*, "would come out the same way." *Id.* We are informed by this guidance and agree with the district court that the *Barnes-O'Brien* test is applicable to the Mobile ordinance.[5]

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[5] The dissent rejects the application of *LaRue* and *Barnes* to the Mobile ordinance because it believes *44 Liquormart*, Inc. v. Rhode Island, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996), "eviscerated" the rationale of *LaRue*. This conclusion is reached despite the fact that the Supreme Court in *44 Liquormart* specifically cautions us against just such a view. By expressing its opinion that *LaRue* would come out the same way, the Court may have hoped to forestall the view that *44 Liquormart* is the death knell for ordinances prohibiting nude entertainment in bars. The Court characterized the Twenty-first Amendment analysis of *LaRue* as merely a "buttress" to the conclusion that the First Amendment did not invalidate California's prohibition of certain grossly sexual exhibitions in

The district court held that the Mobile ordinance passes all these tests for a constitutional regulation of expressive conduct: the regulation of public health, safety, and morals is a valid and substantial state interest; the Mobile ordinance's statement of purpose and findings as to the problems created by the combination of alcohol and nude entertainment are sufficient to support the requirement that the regulation further this interest; this interest is unrelated to the suppression of free expression; and the ordinance is narrowly tailored to the perceived problem.

We agree. The preamble to the ordinance finds that nudity and sexually explicit entertainment coupled with alcohol in public places "encourages undesirable behavior and is not in the interest of public health, safety, and welfare." Thus, the ordinance is aimed at the very type of harm found to create a substantial government interest in *LaRue*, *Barnes*, International Eateries and a host of other cases. Furthermore, Mobile has a "reasonable basis" for believing that its ordinance will serve this substantial governmental interest. *See Int'l Eateries*, 941 F.2d at 1162. The district court located this reasonable basis in the experience of other cities, studies done in other cities, case law reciting findings on the issue, as well as their own wisdom and common sense. This is sufficient.[6] The Supreme Court has itself noted

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premises licensed to serve alcoholic beverages. 517 U.S. at 514-16, 116 S.Ct. at 1514. Although no longer buttressed by the added presumption of the Twenty-first Amendment, the Court was careful to remind us that such ordinances remain protected by the continued vitality of a long line of approving cases, including *LaRue* and *Barnes*.

[6] It is clear that under *Barnes*, there is no constitutional requirement that a city make particularized findings regarding the adverse effects of the combination of alcohol and nude entertainment. The Court noted that there were no findings nor any legislative history attached to the Indiana statute, but found the "statute's purpose

that "[c]ommon sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior." *Bellanca*, 452 U.S. at 718, 101 S.Ct. at 2601. Finally, the requirement that the dancers partially cover their breasts or cease to serve alcohol is certainly the least restriction possible which would still further the city's interest in controlling the combustible mixture of alcohol and nudity.

The dissent believes that the ordinance does not meet the third requirement of this test, i.e., that the city's interest be unrelated to the suppression of the message of nude dancing. Indeed, the dissent rejects the applicability of the *Barnes-O'Brien* test itself because it finds the Mobile ordinance to be a "content-based" regulation, subject to a "searching" level of scrutiny.[7]

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of protecting societal order and morality is clear from its text and history." 501 U.S. at 568, 111 S.Ct. at 2461. *See* also *Cafe 207, Inc. v. St. Johns County*, 856 F.Supp. 641, 645 (M.D.Fla.1994), aff'd per curiam, 66 F.3d 272 (11th Cir.1995) ("It is now established as a matter of law by Supreme Court jurisprudence culminating in [*Barnes*] that secondary effects of proscribed conduct may be taken into consideration by a court evaluating the governmental interests justifying impingement upon free speech rights even when, as in *Barnes*, there is no legislative history demonstrating that the lawmakers actually considered secondary effects or any other specific factor (such as protecting order and morality) in enacting the challenged law.").

[7] The dissent's argument that the *Barnes-O'Brien* test is inapposite because the Indiana statute there was content-neutral, whereas Mobile's ordinance is content-based, ignores the claim in *Barnes*. While Indiana's statute, on its face, prohibits public nudity rather than "expressive conduct," the claim in *Barnes* was not that the statute was facially invalid, but that it was unconstitutional as applied to nude dancing. There was no claim in *Barnes* that the statute was unconstitutional because it prohibited nudity simpliciter. The claim was that the statute was unconstitutional because it prohibited nude dancing. The same claim is made against the Mobile ordinance.

Characterizing Mobile's ordinance as content-based is a clear departure from prior cases holding that such ordinances are not aimed at the erotic message of nude dancing. For example, in *Barnes*, the Supreme Court held that Indiana's interest in prohibiting public nude dancing was "unrelated to the suppression of free expression." 501 U.S. at 570, 111 S.Ct. at 2463. The Court rejected the argument that merely because nude dancing may have some expressive content, an ordinance prohibiting such dancing must be aimed at the suppression of that content. The purpose of Indiana's statute was not to suppress the erotic message of nude dancing, but to address the evil of public nudity. *Id.* The Court concluded, "[i]t was not the dancing that was prohibited, but simply its being done in the nude." *Id. See* also *Buzzetti v. New York City*, 140 F.3d 134 (2d Cir.1998) (ordinance barring adult businesses from residential zones and certain other areas is a content-neutral and aimed at curbing negative effects of adult businesses on surrounding areas rather than seeking to suppress free expression).

We too have rejected the idea that ordinances aimed at nude entertainment are necessarily content-based. In holding such an ordinance to be a valid regulation of the time, place and manner of expressive conduct, we wrote:

The only restriction imposed by the ... ordinance is in terms of the place where nude dancing may be presented [i.e., only in places not serving alcohol]. This type of regulation has been recognized as independent of expressive or communicative elements of conduct in other

contexts. *Grand Faloon Tavern*, 670 F.2d at 947(emphasis added).[8]

Similarly, the Mobile ordinance does not seek to ban whatever message is conveyed by nude dancing. It does not even seek to ban nude dancing. In prohibiting nude dancing where liquor is sold, the ordinance restricts only the place or manner of nude dancing without regulating any particular message it might convey. No party disputes that the completely nude dancing which Sammy's, having surrendered its liquor license, now presents is legal under the ordinance. Nude dancing appears to be allowed everywhere in Mobile, except where alcohol is served. Mobile is attempting only to regulate the sale of alcohol in inappropriate places and it has determined that it is inappropriately sold in places where nude dancing is offered. Therefore, the ordinance is constitutional under the *Barnes-O'Brien* test.

Furthermore, the *Barnes-O'Brien* test applies to this ordinance even if it is not strictly content-neutral. It is true that not all dancing is prohibited in Mobile, only nude dancing where liquor is served. To that extent, the ordinance refers to the "content" of the dancing. The

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[8] Although the dissent relies heavily on our subsequent opinions in *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir.1985) and *Leverett v. City of Pinellas Park*, 775 F.2d 1536 (11th Cir.1985), neither undermines *Grand Faloon's* premise that Mobile's ordinance is content-neutral. Both cases not only do not explicitly hold that regulations such as the one at bar are content-regulatory but also do not apply the strict scrutiny appropriate for content regulations. Instead, both *Krueger* and *Leverett* require only that cities demonstrate that ordinances such as Mobile's advance "legitimate interests" and struck down nude dancing ordinances because the records in those cases did not show that the ordinances furthered any legitimate government interest unrelated to the suppression of free expression. *See Krueger*, 759 F.2d at 855- 56; *Leverett*, 775 F.2d at 1540-41.

dissent, however, seems to equate this reference to content with content suppression. The dissent says, for example, that the ordinance is an "outright ban targeted solely at conduct protected by the First Amendment" and that, "on its face, it singles out nude entertainment and thus the erotic message conveyed by that conduct." [9]

The Supreme Court, however, does not equate reference to content with suppression of content. The Court applies the *Barnes-O'Brien* intermediate level of scrutiny to ordinances which distinguish between nude and clothed entertainment, but which are aimed only at the secondary effects of nude entertainment. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48, 106 S.Ct. 925, 929, 89 L.Ed.2d 29 (1986) (ordinance "by its terms [was] designed to prevent crime, protect city's retail trade, maintain property values, and generally protect and preserve the quality of the city's neighborhoods, commercial districts, and the quality of urban life"); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 n. 34, 96 S.Ct. 2440, 2453 n. 34, 49 L.Ed.2d 310 ("[i]t is [the] secondary effect [of crime and urban deterioration]

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[9] In fact, the dissent apparently rejects the idea that any such ordinance might ever be justified as an attempt to address the undesirable secondary effects of the commingling of alcohol and nudity because such ordinances are "content-based regulations of expressive behavior." For example, the dissent states that the reason we upheld the City of Pinellas Park's ordinance prohibiting nudity in the course of food and drink service in *Leverett v. City of Pinellas Park*, 775 F.2d 1536 (11th Cir.1985), was "because the ordinance did not apply to protected expression, such as dancing." (emphasis added) To the dissent, any regulation of the place or manner of nude dancing is also necessarily a regulation of the content of such expression. This contention presupposes that all nude dancing conveys the same message, when, in fact, controversy rages both in academia and society at large as to whether nude dancing, films, and other such exhibitions express messages of liberation or submission. We cannot assume that any regulation addressing nude dancing is a content regulation.

which these zoning ordinances attempt to avoid, not the dissemination of 'offensive speech' ").

In *International Eateries*, we too upheld a city ordinance regulating nude dancing aimed at "protecting the quality of urban life from the secondary effects of adult businesses." 941 F.2d at 1162. Applying *Barnes-O'Brien* scrutiny, we concluded that the ordinance was valid because it furthered a substantial governmental interest in regulating these secondary effects. *Id. See* also *Buzzetti*, 140 F.3d 134.

Mobile also defends its ordinance as an attempt to combat the secondary effects of nude performance in a bar atmosphere. Just as the cities in *Renton, Young*, and *International Eateries*, it seeks, geographically, to separate adult entertainment establishments from other commercial establishments--in this case, bars--in order to minimize the secondary effects of that combination.

The dissent rejects this analogy. It believes these cases are inapposite because the zoning regulations therein were "content-neutral," as opposed to the "content-based" Mobile ordinance. The zoning ordinances in *Renton*, *Young*, and *International Eateries*, however, were not content-neutral. They treated adult theaters differently from other theaters. They were content-based to the same extent, and in exactly the same way, as the ordinance in Mobile which treats nude dancing differently from clothed dancing.[10]

Mobile is attempting to regulate the secondary effects of the combination of alcohol and nude dancing without prohibiting either. It does not seek to ban bars or nude dancing. Everyone can still buy a drink and watch

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[10] In fact, the clothes required are few--a g-string and pasties will satisfy the statute.

nude dancing in Mobile. They cannot, however, do both in the same place. The dissent seems to believe this may violate the rights of the people of Mobile, but we are unaware of any constitutional right to drink while watching nude dancing.[11] Accordingly, the judgment of the district court is AFFIRMED.

KRAVITCH, Senior Circuit Judge, dissenting:

Instead of enacting a generally applicable proscription on public nudity or a general prohibition on nudity in establishments licensed to serve alcohol, the City of Mobile chose to address "the combustible mixture of alcohol and nudity" by singling out traditionally protected forms of expression for criminal sanction. Although I agree with the majority that there is no "constitutional right to drink while watching nude dancing," the Constitution does confer a right to be free from government regulation that prohibits expressive conduct on the basis of content. Because I believe that the majority fundamentally misapprehends the restrictions that the First Amendment imposes upon governmental power to regulate expression, I respectfully dissent.

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[11] The reference in *44 Liquormart* to the proposition that government may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially his interest in freedom of speech--does not apply to this case. In *44 Liquormart*, the Rhode Island ordinance banned liquor price advertising. The ordinance, therefore, did not regulate the time, place, or manner, but rather totally suppressed the commercial speech involved. The Court merely reaffirmed that a state may not ban truthful, nonmisleading commercial speech, the Twenty-first Amendment notwithstanding. Mobile has not banned nude dancing. In *LaRue*, the Court noted that "... the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink." 409 U.S. at 118, 93 S.Ct. at 397.

I.

A.

Preliminarily, I take issue with the majority's apparent assumption that because Ordinance 03-003 does not ban nude dancing outright, but rather merely conditions the right to present entertainment involving nudity on the surrender of a liquor license, the Ordinance does not significantly burden the exercise of First Amendment rights. The majority's reasoning ignores the well- established proposition that

> "[e]ven though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right. In *Perry v. Sindermann*, 408 U.S. 593[, 597], 92 S.Ct. 2694[, 2697], 33 L.Ed.2d 570 (1972), relying on a host of cases applying that principle during the preceding quarter-century, the Court explained that government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially his interest in freedom of speech."

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 513, 116 S.Ct. 1495, 1513, 134 L.Ed.2d 711 (1996) (internal citation omitted). Although the City may regulate the sale or service of alcohol, it may not condition the conferral of a liquor license--to which appellants concede they are not constitutionally entitled--on the forfeiture of the right to engage in expressive

behavior.[1] Because the City authorizes the punishment, by fine or imprisonment, of licensees who "exhibit, suffer, allow, permit, engage in, participate in, or [are] connected with" one form of expressive behavior, the challenged ordinance imposes a significant burden upon First Amendment freedoms.[2]

B.

In denying appellants' respective motions for preliminary injunctive relief, the district court relied upon "a long line of [Twenty-first Amendment] cases upholding the states' authority to prohibit nude dancing in clubs licensed to sell alcohol."[3] After the district court entered the preliminary orders, but before the court ruled on the parties' motions for summary judgment, the Supreme Court *decided 44 Liquormart, Inc. v. Rhode*

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[1] The majority concedes that it is well established that "nude dancing ... is expressive conduct within the outer perimeters of the First Amendment...." *Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560, 566, 111 S.Ct. 2456, 2460, 115 L.Ed.2d 504 (1991).

[2] I disagree with the majority's conclusion that the "reference in *44 Liquormart* to the proposition that government may not deny a benefit to a person on a basis that infringes his constitutionally protected interests ... does not apply to this case." The applicability of the unconstitutional conditions doctrine does not turn on whether conferral of the discretionary benefit is conditioned upon completely foregoing the right to engage in expression or instead upon foregoing the right to engage in that expression in certain places or manners or at certain times. Rather, the doctrine applies as long as the governmental actor demands some sacrifice of a constitutional right in exchange for an otherwise discretionary benefit. *See FCC v. League of Women Voters*, 468 U.S. 364, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984) (invalidating provision of Public Broadcasting Act that prohibited noncommercial educational television stations that received public funds from endorsing candidates or editorializing); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) (holding that constitutionally protected speech is impermissible ground for discharge from public employment).

[3] Summary Judgment Order ("Order") at 6.

Island, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996), which dispelled definitively the notion that the Twenty-first Amendment "qualif[ies] the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment." *Id.* at 516, 116 S.Ct. at 1515. The district court recognized that *44 Liquormart* foreclosed the argument that the Twenty-first Amendment "provides an added presumption in favor of validity of state regulation in the area of topless dancing,"[4] but nevertheless concluded that the case "provided us with the roadmap for upholding" such state regulation.[5] In *44 Liquormart, the Court cited Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), for the proposition that states enjoy the power "to restrict ... 'bacchanalian revelries' ... regardless of whether alcoholic beverages are involved." *44 Liquormart*, at 515, 116 S.Ct. at 1514 (citing *Barnes* and quoting *California v. LaRue*, 409 U.S. 109, 118, 93 S.Ct. 390, 397, 34 L.Ed.2d 342 (1972)). The district court interpreted this reference in *44 Liquormart* to mean that *Barnes* controls all First Amendment challenges to ordinances regulating nudity.

Following the district court's lead, the majority, although conceding that *44 Liquormart* requires application of First Amendment scrutiny to the ordinance in question, suggests that *44 Liquormart* confirms the City's power to regulate nude dancing in establishments licensed to sell alcohol. The majority concludes that the Court's treatment in *44 Liquormart* of earlier First Amendment cases involving state regulation of alcohol and nude dancing provides support for the conclusion that Ordinance 03-003 does not offend the First Amendment. In *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), one of those earlier cases, the Court upheld a regulation of nude dancing in establishments

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4 Order at 8 (internal quotations omitted).

5 Id.

serving alcohol on the basis of the authority conferred upon states by the Twenty-first Amendment. In *44 Liquormart*, the Court, "[w]ithout questioning the holding in *LaRue*, ... disavow[ed] its reasoning insofar as it relied on the Twenty-first Amendment." 517 U.S. at 516, 116 S.Ct. at 1514. Because the Court in *44 Liquormart* stated in dicta that *LaRue* would have been resolved the same way had the Court not relied erroneously upon the Twenty-first Amendment, *see 44 Liquormart*, at 515, 116 S.Ct. at 1514 ("We are now persuaded that the Court's analysis in *LaRue* would have led to precisely the same result if it had placed no reliance on the Twenty-first Amendment."), the majority concludes that Ordinance 03-003 likewise should survive First Amendment scrutiny.

This case presents this circuit's first occasion to address the impact of *44 Liquormart* on state power to regulate nude dancing and the continued vitality of *LaRue*. In *LaRue*, the Court addressed the constitutionality of California Department of Alcoholic Beverage Control regulations that prohibited various forms of sexual conduct in licensed establishments. The Court, noting that "[t]he state regulations here challenged come to us, not in the context of censoring a dramatic performance in a theater, but rather in a context of licensing bars and nightclubs to sell liquor by the drink," *LaRue*, 409 U.S. at 114, 93 S.Ct. at 395, reviewed the regulations under a standard considerably more deferential than it ordinarily reviews prohibitions targeted at protected expressive behavior. In light of what the Court believed to be "the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires," *id.* at 118-19, 93 S.Ct. at 397, the Court decided that the Department's regulations were not "irrational" or "unreasonable," *id.* at 116, 93 S.Ct. at 396. The Court's discussion of the state's authority to regulate conduct with a communicative

element, however, is hard to square with later decisions. The Court in *LaRue* stated:

> While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink. *Id.* at 118, 93 S.Ct. at 397. Precedent now makes clear that a state cannot condition a benefit on a forfeiture of First Amendment rights, *see 44 Liquormart*, at 512-14, 116 S.Ct. at 1513, or regulate the time, place, or manner of protected expression with content-based prohibitions, *see Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661 (1989) ("[T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech ....' " (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984))). Although the *44 Liquormart* Court, in dicta, did not disturb the holding of *LaRue*, the Court eviscerated the basis for that decision. The *44 Liquormart* Court squarely addressed whether the Twenty-first Amendment "qualif[ies] the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment," 517 U.S. at 516, 116 S.Ct. at 1515, but it did not have before it, as did the Court in *LaRue* and as does our court now, a regulation prohibiting nude dancing in establishments with liquor licenses. The Court therefore had no occasion to evaluate closely the constitutionality of such an ordinance.[6] Unlike the

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[6] N.Y. State Liquor Auth. v. *Bellanca*, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981), and Newport v. Iacobucci, 479

majority, I do not believe that the dicta in *44 Liquormart* compels us to uphold the ordinance challenged here.

C.

The majority reads *44 Liquormart* to require this court to review the challenged ordinance under the intermediate scrutiny applied in United States v. *O'Brien*,

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U.S. 92, 107 S.Ct. 383, 93 L.Ed.2d 334 (1986), cited by the majority, likewise cannot provide support for the regulatory authority the City seeks to exercise. In *Bellanca*, the Court upheld a statute prohibiting nude dancing in establishments licensed to sell liquor. The sole basis of the Court's holding, however, was the power that it believed the Twenty-first Amendment conferred upon states to regulate alcohol. The Court concluded that "[j]udged by the standards announced in *LaRue* and *Doran* [*v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975), which followed *LaRue*], the statute at issue here is not unconstitutional." 452 U.S. at 717, 101 S.Ct. at 2601. Relying upon a greater-includes- the-lesser rationale that has since been discredited, *see 44 Liquormart*, at 510-12, 116 S.Ct. at 1512; infra Section I.C, at note 7, the Court reasoned that the "State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs," *Bellanca*, 452 U.S. at 717, 101 S.Ct. at 2601, and that "[w]hatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty-first Amendment," *id.* at 718, 101 S.Ct. at 2602. *Bellanca* thus rests upon a jurisprudential underpinning no longer followed by the Court. Likewise, the Court in Iacobucci, following *LaRue* and *Bellanca*, upheld an ordinance prohibiting "performing nude or nearly nude" in establishments licensed to sell liquor. 479 U.S. at 93 n. 1, 107 S.Ct. at 384 n. 1. The sole rationale advanced by the Court in upholding the regulation was the power that the Court believed the Twenty-first Amendment conferred upon states to regulate alcohol. *See id.* at 97, 107 S.Ct. at 386 (" 'Given the added presumption in favor of the validity of the ... regulation in this area that the Twenty-first Amendment requires,' it is plain that, as in *Bellanca*, the interest in maintaining order outweighs the interest in free expression by dancing nude.") (quoting *LaRue*, 409 U.S. at 118-19, 93 S.Ct. at 397). After *44 Liquormart*, *Bellanca* and *Iacobucci* appear to lack precedential value.

391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). *O'Brien* scrutiny is appropriate when a generally applicable regulation not directed at the communicative elements of conduct nevertheless infringes rights of free expression. *See O'Brien*, 391 U.S. at 376-77, 88 S.Ct. at 1678-79. *O'Brien* scrutiny involves the application of a four-part test:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377, 88 S.Ct. at 1679. The majority concludes that the Supreme Court's decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), which reviewed under *O'Brien* scrutiny a challenge to Indiana's prohibition on public nudity as applied to nude dancing, controls the case sub judice and accordingly that this court should apply the *O'Brien* four-part test.

In *Barnes*, the Court addressed the constitutionality of Indiana's "prohibition against complete nudity in public places," 501 U.S. at 564, 111 S.Ct. at 2459, as applied to establishments that provide totally nude dancing as entertainment. The Court, although recognizing that nude dancing "is expressive conduct within the outer perimeters of the First Amendment, though ... only marginally so," *id.* at 566, 111 S.Ct. at 2460, concluded that the law was valid because it was supported by a state interest in protecting

order and morality, was not targeted at "the erotic message conveyed by the dancers," and imposed requirements no greater than those necessary to serve the state interest, *id.* at 567-572, 111 S.Ct. at 2461-63.

Barnes, however, does not control the case sub judice. The statute challenged in *Barnes*, although using the identical definition of "nudity" as the ordinance challenged here, did not single out one form of expression for disfavored treatment. The Indiana statute provided:

> A person who knowingly or intentionally, in a public place: (1) engages in sexual intercourse; (2) engages in deviate sexual conduct; (3) appears in a state of nudity; or (4) fondles the genitals of himself or another person; commits public indecency, a Class A misdemeanor.

Ind.Code s 35-45-4-1 (1988), quoted in *Barnes*, 501 U.S. at 569 n. 2, 111 S.Ct. at 2462 n. 2. In contrast, the ordinance challenged here makes it unlawful "knowingly to exhibit, suffer, allow, permit, engage in, participate in, or be connected with, any motion picture, show, performance, or other presentation upon the licensed premises, which, in whole or in part, depicts nudity or sexual conduct or any simulation thereof." City of Mobile Ord. 03-003 (emphasis added). Unlike the statute upheld in *Barnes*, which focused on nudity simpliciter and not on forms of expressive conduct or the messages they convey, the City of Mobile ordinance applies only to forms of conduct that are inherently--and traditionally--communicative: motion pictures, shows, performances, and "other presentation[s]." *Cf. Int'l Eateries of Am. v. Broward County*, 941 F.2d 1157, 1161 (11th Cir.1991) (noting distinction between generally applicable, content-neutral regulations and those prohibiting conduct

"precisely because of its communicative attributes") (quoting *Barnes*, 501 U.S. at 577, 111 S.Ct. at 2466 (Scalia, J., concurring in the judgment) (emphasis omitted)), cert. denied, 503 U.S. 920, 112 S.Ct. 1294, 117 L.Ed.2d 517 (1992). A regulation that by its terms prohibits only traditional forms of expression cannot be said to be unrelated "to the suppression of free expression within the meaning of *O'Brien* ... [and thus is] outside of *O'Brien* 's test altogether." *Texas v. Johnson*, 491 U.S. 397, 410, 109 S.Ct. 2533, 2543, 105 L.Ed.2d 342 (1989).[7]

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[7] En route to concluding that *O'Brien* intermediate scrutiny controls the case before us, the majority argues that the as-applied challenge in *Barnes* was simply a claim that the Indiana statute "was unconstitutional because it prohibited nude dancing" and thus that the claim in *Barnes* was the "same claim [that] is made against the Mobile ordinance." With all due respect, I believe that the majority misapprehends the difference between an as-applied challenge to a content-neutral regulation and a facial challenge to a content-based regulation. The statute challenged in *Barnes* did not by its terms specifically proscribe nude dancing, but rather prohibited all public nudity--and thereby incidentally prohibited some otherwise lawful expression. That the claim raised by the respondents in that case sounded in the First Amendment does not mean that their claim was identical to the one made by appellants in the case before us. Courts long have distinguished between content- based regulations targeted at expression, on the one hand, and generally applicable, content-neutral regulations that incidentally burden expressive freedoms, on the other. *See generally L. Tribe, American Constitutional Law* §§ 12-2, 12-3 (1988). Simply because it is within governmental power to accomplish a particular end, such as a categorical ban on nudity that a fortiori includes a more specific ban on nude dancing, does not mean that any means chosen will satisfy the requirements of the First Amendment. Rather, the First Amendment often requires courts to invalidate regulations that accomplish ends that lawfully could be achieved by different means. *Compare Texas v. Johnson*, 491 U.S. 397, 406-410, 109 S.Ct. 2533, 2540- 2543, 105 L.Ed.2d 342 (1989) (invalidating state law that prohibited "desecration of venerated object[s]," because by singling out symbolic objects for protection, the state's asserted interest was implicated only when "a person's treatment of the flag communicates some message"), with *O'Brien*, 391 U.S. at 370, 88 S.Ct. at 1675 (upholding conviction for burning

This court often has distinguished regulations proscribing nudity per se, including general proscriptions on nudity in particular fora, from regulations targeted at expressive conduct. In *Grand Faloon Tavern, Inc. v. Wicker*, 670 F.2d 943 (11th Cir.1982), we upheld a city ordinance banning nudity on premises where alcohol was served. The ordinance, unlike the one before us now, did not single out nudity in "any motion picture, show, performance, or other presentation," but rather simply banned all nudity in establishments offering alcohol for sale. *See id.* at 944 n. 2. Because the regulation thus was not targeted at traditionally expressive behavior, we applied *O'Brien* scrutiny and upheld the ban. In *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir.1985), however, we invalidated a ban almost identical to that in *Grand Faloon* because, unlike the ban in *Grand Faloon*, which was supported by a legitimate and substantial government interest in regulating activities likely to lead to breaches of the peace, the record demonstrated that the city's motive was to restrict expression. 759 F.2d at 855-56. Both cases addressed regulations that facially banned all nudity in establishments licensed to serve alcohol, rather than solely nudity in the course of traditionally expressive forms of conduct. *See Krueger*, 759 F.2d at 853-54 n. 3; *Grand Faloon*, 670 F.2d at 944 n. 2.

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draft card under statute that proscribed "knowingly destroy[ing]" or "knowingly mutilat[ing]" a Selective Service Registration certificate). Indeed, the First Amendment stands in part for the proposition that the greater power--in this case, the authority to regulate nudity--does not always include the lesser power--in this case, the authority to ban solely expressive conduct involving nudity. *See 44 Liquormart*, at 512, 116 S.Ct. at 1512 (rejecting greater-includes-the-lesser reading of the First Amendment and stating that "[t]he text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct").

Ordinance 03-003 on its face singles out nude entertainment and thus the "erotic message conveyed" by that conduct. *Barnes*, 501 U.S. at 570, 111 S.Ct. at 2463. Ordinance 03-003 would not by its terms apply, for example, to a nude waitress serving drinks at a licensed establishment or to a patron entering such a club nude, whereas it would apply to a production of "Hair" or "Equus"--or any other artistic production that includes nudity, however minor or incidental--at a club licensed to sell alcohol. Cf. *Barnes*, 501 U.S. at 585 n. 2, 111 S.Ct. at 2470 n. 2 (Souter, J., concurring in the judgment) ("It is difficult to *see* ... how the enforcement of Indiana's statute against nudity in a production of 'Hair' or 'Equus' somewhere other than an 'adult' theater would further the State's interest in avoiding harmful secondary effects...."). Instead of targeting nudity per se, which clearly is a permissible exercise of municipal or state authority, *see Barnes*, *supra*, the Mobile ordinance targets only conduct with communicative elements.[8] Because courts consistently have reviewed such contentbased restrictions with a level of scrutiny more searching than *O'Brien* scrutiny, which we have applied to generally applicable, content-neutral regulations, the majority is incorrect to conclude, simply because the claim before the court is a

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[8] The majority suggests that "[w]e cannot assume that any regulation addressing nude dancing is a content regulation," because "controversy rages both in academia and society at large" over what precise message nude dancing conveys. I would have thought, however, that an ordinance targeted at communicative activities that express multiple messages is as invidious as, if not more so than, an ordinance that targets merely one message. One need only consider a simple example to *see* how subversive of basic First Amendment values the majority's reasoning is: an ordinance banning all dancing would suppress a wide array of messages that could be conveyed by dancing, yet, according to the majority, that regulation would be permissible because "we cannot assume" that it targets any one particular message.

challenge to a nudity ordinance, that *Barnes* 's *O'Brien* scrutiny is appropriate in this case.[9]

D.

Because I believe that the majority applies the wrong level of scrutiny, I address the City's argument that time, place, and manner scrutiny--another form of intermediate scrutiny--is applicable in this case. In my view, in determining the appropriate level of scrutiny, this court should look to the character of the regulation. If the regulation is content-based--because it singles out one form of expression for disfavored treatment--then searching scrutiny is appropriate. *See Boos v. Barry*, 485 U.S. 312, 321, 108 S.Ct. 1157, 1164, 99 L.Ed.2d 333 (1988). If, on the other hand, the regulation is content-neutral--because it is justified not by "reference to the content of the regulated speech," *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976), but rather to the "secondary effects" of that speech, *see Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47, 106 S.Ct. 925, 929, 89 L.Ed.2d 29 (1986)--then

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[9] Moreover, contrary to the majority's unsupported assertion, the Court in *44 Liquormart* did not suggest that *Barnes*'s *O'Brien* scrutiny should apply in all cases involving ordinances regulating nudity. Instead, the Court merely cited *Barnes* to support the statement that "the Court has recognized that the States' inherent police powers provide ample authority to restrict the kind of 'bacchanalian revelries' described in the *LaRue* opinion regardless of whether alcoholic beverages are involved." *44 Liquormart*, at 515, 116 S.Ct. at 1514. I doubt that the Court, in announcing a decision that restricted governmental power to regulate speech, meant to suggest that courts now should evaluate content- based regulations under the more-deferential *O'Brien* standard of review. Instead, the Court's citation to *Barnes* merely confirms that states and municipalities presumptively may regulate nudity with generally applicable, content-neutral ordinances--ordinances wholly unlike that passed by the City in this case.

less-searching time, place, and manner scrutiny may be appropriate, *see id.* at 46, 106 S.Ct. at 928.

The City contends, and the majority agrees, that the Ordinance was not promulgated because of a disagreement with the message conveyed by nude dancing, but rather was an attempt to regulate the secondary effects of nude dancing. The City and the majority rely upon *Renton*, *supra*, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), and *Int'l Eateries of Am. v. Broward County*, 941 F.2d 1157, 1161 (11th Cir.1991), cert. denied, 503 U.S. 920, 112 S.Ct. 1294, 117 L.Ed.2d 517 (1992). In *Renton* and *Young*, the Court upheld zoning ordinances restricting the permissible locations for adult theaters that presented nude dancing. Although the regulations challenged in those cases "treat[ed] theaters that specialize in adult films differently from other kinds of theaters," *Renton*, 475 U.S. at 47, 106 S.Ct. at 929, and thus at first blush seemed to be content-based, the Court in each case concluded that the regulations were justified without reference to the content of the regulated speech because they were "aimed not at the content of the films ..., but rather at the secondary effects of such theaters on the surrounding community," *id.* (emphasis in original); *accord Young*, 427 U.S. at 71 n. 34, 96 S.Ct. at 2453 n. 34. In *Renton*, for example, the Court upheld the district court's conclusion that the "city's pursuit of its zoning interests here was unrelated to the suppression of free expression" because the Court believed that the ordinance "by its terms [was] designed to prevent crime, protect the city's retail trade, maintain property values, and generally protect and preserve the quality of the city's neighborhoods, commercial districts, and the quality of urban life." 475 U.S. at 48, 106 S.Ct. at 929; *accord Young*, 427 U.S. at 71 n. 34, 96 S.Ct. at 2453 n. 34 (noting that "[i]t is [the] secondary effect [of crime and urban deterioration] which these zoning ordinances

attempt to avoid, not the dissemination of 'offensive' speech").

In *International Eateries*, this court applied *Renton* to uphold a local zoning ordinance restricting the permissible locations for clubs presenting non-obscene nude dancing. Applying time, place, and manner scrutiny, this court concluded that the challenged ordinance: (1) furthered a substantial governmental interest in "protecting the quality of urban life from the secondary effects of adult businesses," 941 F.2d at 1162; (2) was narrowly tailored to further that interest because it focused only on those businesses likely to cause secondary effects, *id.* at 1163; and (3) allowed reasonable alternative avenues of communication because there were "sufficient alternative locations" where the theaters could lawfully operate, *id.* at 1165.[10]

The significant difference between the ordinance challenged in International Eateries and the one challenged here, however, is that the former was a zoning ordinance, whereas the one in the case before us is a direct regulation of expressive conduct.[11] Closely read, *Renton*, *Young*, and *International Eateries* apply only to zoning ordinances. *See Renton*, 475 U.S. at 49, 106 S.Ct. at 929-30 ("[Z]oning ordinances designed to combat the undesirable secondary effects of such businesses are to be

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[10] We applied the Renton secondary-effects analysis in International Eateries because at issue was the validity of a zoning ordinance similar to that considered in *Renton* and *Young*. *See* 941 F.2d at 1161. Distinguishing *Barnes*, we concluded that *O'Brien* scrutiny was inappropriate because the regulation "single[d] out nude dancing rather than broadly prohibiting all public nudity." *Id.*

[11] Contrary to the majority's suggestion, Ordinance 03-003 does not seek "geographically [ ] to separate adult entertainment establishments from other commercial establishments." (Emphasis added). Instead, the Ordinance seeks categorically to ban nude dancing in establishments-- wherever they may be located--that serve alcohol.

reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations.") (emphasis added); Young, 427 U.S. at 71, 96 S.Ct. at 2453 ("[W]hat is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited...."); *Int'l Eateries*, 941 F.2d at 1159 ("[T]he Supreme Court has held that under some circumstances cities may enact zoning ordinances that require adult movie theatres to locate only in certain areas, provided that the purpose of the regulation is to control the secondary effects of these businesses.") (emphasis added) (internal quotation omitted); *see* also *Buzzetti v. City of New York*, 140 F.3d 134 (2d Cir.1998) (upholding city's "Zoning Amendment," which "does not forbid the operation of any category of business [but i]nstead ... restricts the areas in which certain sexually-oriented businesses may operate"). Indeed, zoning regulations are amenable to time, place, and manner scrutiny at least in part because, although they restrict the locations available for a given use, they generally leave some areas open for the disfavored use. *See Renton*, 475 U.S. at 54, 106 S.Ct. at 932 ("[The City has] sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theaters from locating in other areas. This, after all, is the essence of zoning."); *Young*, 427 U.S. at 71 n. 35, 96 S.Ct. at 2453 n. 35.

Unlike the zoning ordinances upheld in *Young*, *Renton*, and *International Eateries*, which preserved for adult entertainment "ample, accessible real estate," *Renton*, 475 U.S. at 53, 106 S.Ct. at 932, the City of Mobile's regulation prohibits establishments that wish to serve alcohol and present nude dancing from operating anywhere. Of course, as the City and the majority point out, appellants are free to provide nude dancing at their current locations as long as they are willing to forego the privilege of serving alcohol. As already stated, however,

see supra Section I.A, this argument ignores the well-established proposition that government may not condition the "conferral of [a] benefit ... on the surrender of a constitutional right." *44 Liquormart*, at 513, 116 S.Ct. at 1513. Although the Supreme Court and this circuit have upheld zoning regulations that, as measures of social policy, have dissipated or segregated the effects of adult theaters, neither has, without relying on a now-discredited view of the Twenty- first Amendment, upheld an outright ban targeted solely at conduct protected by the First Amendment.[12] Because I conclude that the secondary-effects exception is inapplicable in this case, I believe that this court should analyze Ordinance 03-003 as a content-based restriction.

E.

My conclusion that Ordinance 03-003 is a content-based restriction on protected expression that must be evaluated under searching judicial scrutiny finds strong support in case law. This court has distinguished between

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[12] In *Barnes*, Justice Souter argued in his concurrence that Indiana could justify application of a generally applicable proscription of public nudity to nude dancing because the state has a legitimate and substantial government interest in combatting the secondary effects of adult entertainment. His concurrence, however, simply sought to justify the burden on First Amendment freedoms imposed by application of a content- neutral statute to expressive behavior--a result contemplated by *O'Brien*--and did not suggest that a prohibition, other than a zoning regulation, targeted at expressive behavior could be justified by reference to the secondary effects of the targeted behavior. Likewise, in *Cafe 207, Inc. v. St. Johns County*, 66 F.3d 272 (11th Cir.1995), *aff'g* 856 F.Supp. 641 (M.D.Fla.1994), this court affirmed the district court's conclusion that the governmental-interest prong of the *O'Brien* test was satisfied because, inter alia, the regulation combatted the secondary effects of nudity in adult entertainment. 856 F.Supp. at 644. Like the statute in *Barnes*, the ordinance challenged in *Cafe 207* was a generally applicable, and not a content-based, prohibition on public nudity. The majority's reliance on *Cafe 207* thus is misplaced.

regulations of nudity that permissibly (and incidentally) burden protected expression and regulations that impermissibly target protected expression for sanction. In *Leverett v. City of Pinellas Park*, 775 F.2d 1536 (11th Cir.1985), this court upheld against a First Amendment challenge an ordinance prohibiting nudity in the course of food and drink service because the ordinance did not apply to protected expression, such as dancing. *See id.* at 1540. The court struck down a companion ordinance that prohibited "nude or semi-nude entertainment in any commercial establishment," *id.* at 1537 (emphasis added); however, because, as a direct regulation of conduct protected by the First Amendment, the court subjected it to "the stricter standard typically used to review an infringement on a protected liberty interest justified solely under the government's police power," *id.* at 1540 (*citing Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir.1985)). The court noted that in order to justify a content-based regulation of protected expression, the city had an obligation to "come forth with more than simply an articulation of some legitimate interest that the city could have had to justify its prohibition." *Leverett*, 775 F.2d at 1540 (internal quotations omitted).[13] Although the conclusory language contained in the ordinances that "competitive commercial exploitation of nudity is adverse to the public health, peace, morals and good order, and [that] it is in the best interest of the public health, safety and convenience to restrict such nudity ...," *id.* at 1539, was sufficient to justify the ordinance generally proscribing nudity in the course of food service because that ordinance did not "on its face govern activity

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[13] *See Leverett*, 775 F.2d at 1540 ("When a fundamental interest such as freedom of expression is regulated, the City must also show that the legitimate concern it articulates has 'more than merely speculative factual grounds, and that it was actually a motivating factor in the passage of the legislation.' ") (*quoting Krueger v. City of Pensacola*, 759 F.2d 851, 855 (11th Cir.1985)).

protected by the First Amendment," *id.* at 1540, the language could not save the ordinance prohibiting nude entertainment.

The ordinance invalidated in *Leverett*, which was targeted solely at expressive conduct, is indistinguishable from the one challenged here. *See also BSA, Inc. v. King County*, 804 F.2d 1104, 1107-08 (9th Cir.1986) (enjoining operation of statute explicitly banning "common barroom type topless dancing" because the "[p]rohibition of a category of protected expression, including that which is sexually explicit, can be upheld only where it furthers a substantial governmental interest unrelated to suppression of free expression ... and where the governmental interest could not be served by a means less intrusive on First Amendment activity"). I am convinced that this court should review Ordinance 03-003, as well, under "the stricter standard typically used to review an infringement on a protected liberty interest justified solely under the government's police power." *Leverett*, 775 F.2d at 1540.

F.

In my view, the City has not satisfied this stricter standard. To survive First Amendment scrutiny, the City must, at a minimum, demonstrate that its interest in regulating the conduct at issue in this case "is based on something other than a desire to censor the communication because of the community's dislike of its content." *Krueger*, 759 F.2d at 854. The City argues that it acted to address the adverse secondary effects of nude dancing combined with alcohol consumption and that the preamble to Ordinance 03-003 makes clear that the City was not targeting the message of the expressive conduct, but rather was combatting the secondary effects of that

behavior.[14] The interests stated in the Ordinance's preamble--discouraging "undesirable behavior" and avoiding "disturbances"--are, of course, legitimate governmental interests. As in *Leverett*, however, "the City has made no showing as to the factual basis for its articulated concerns and the motivation for passage of [the ordinance] beyond the conclusions stated in the ordinance itself," 775 F.2d at 1540, a showing that is insufficient to "justify its infringement on protected expression," *id.* The majority concludes that the City permissibly relied upon other cities' findings that the commingling of alcohol and nudity produces undesirable effects. Although the majority is correct that "[t]he First Amendment does not require a city, before enacting [a zoning] ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses," *Renton*, 475 U.S. at 51, 106 S.Ct. at 931 (emphasis added),[15] this court consistently has required a

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[14] Indeed, an argument by the City that it was worried about the effects of adult entertainment alone, as was the city in *Renton*, 475 U.S. at 50, 106 S.Ct. at 930, rather than the effects of the entertainment combined with alcohol consumption, would be unconvincing because the City still permits nude dancing; Sammy's has been presenting nude dancing (without alcohol) since this litigation began, yet has not violated Ordinance 03-003.

[15] *Accord Int'l Eateries*, 941 F.2d at 1162 (holding that a city "need not conduct its own studies" in order to "have a reasonable basis for its belief that the harm to be protected against [by the zoning ordinance] in fact exists"). Likewise, the proof requirements for regulations that are not targeted at expression may be relaxed. *See Barnes*, 501 U.S. at 584-85, 111 S.Ct. at 2470 (Souter, J., concurring in the judgment) ("[L]egislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects.... I do not believe that a State is required affirmatively to undertake to litigate this issue repeatedly in every case."). *But cf. Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 135-36 (6th Cir.1994) (holding that "because the City has failed to demonstrate a link between nudity in non-adult entertainment and secondary effects,

significantly stronger showing to justify content-based regulations of expressive behavior outside of the zoning context, *see, e.g., Leverett*, 775 F.2d at 1540. The mere assertion, unsupported by any legislative findings, that a city seeks to address the undesirable secondary effects of a disfavored activity is insufficient to justify a regulation that by its terms prohibits only conduct that is protected by the First Amendment.

Even if the City had made findings, moreover, I have serious doubts that the City's interest in discouraging undesirable behavior and avoiding disturbances would be sufficient to justify Ordinance 03-003's content-based restriction. Furthermore, given the availability of alternative regulatory means that could accomplish the City's avowed goals without singling out protected expression for sanction, *see* infra Section II, in my view Ordinance 03-003 could not satisfy the means scrutiny that the First Amendment requires. I therefore would hold that the district court erred in granting summary judgment in favor of the City on appellants' First Amendment claim and that the district court should have granted summary judgment in favor of appellants on their facial challenge to Ordinance 03-003.

II.

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we do agree with the district court that the Akron ordinance must be struck down as facially unconstitutional under the First Amendment overbreadth doctrine"; stating that "[t]he ordinance makes no attempt to regulate only those expressive activities associated with harmful secondary effects and includes no limiting provisions"). Contrary to the majority's suggestion however, this court never has allowed a state or municipality to enact a content-based restriction on expression based upon a mere showing that other localities have identified an evil to be addressed.

This court does not have before it a generally applicable proscription on public nudity, see, e.g., *Barnes*, 501 U.S. at 569 n. 2, 111 S.Ct. at 2462 n. 2, or a general prohibition on nudity in establishments licensed to serve alcohol that is not limited solely to expressive conduct, *see, e.g., Grand Faloon Tavern, Inc. v. Wicker*, 670 F.2d 943, 944 n. 2 (11th Cir.1982). Presumably, either of those approaches would have accomplished the City's avowed goals and survived First Amendment scrutiny.[16] Instead, the City of Mobile chose to address the problems associated with "nudity, sexual conduct [,] and [the] depiction thereof[ ] coupled with alcohol in public places," City of Mobile Ord. 03-003, by subjecting to criminal sanction only activity clearly recognized to be within the protection of the First Amendment. Because I believe that the First Amendment prohibits the City of Mobile from enacting such a regulation and that the majority has misapplied long-established First Amendment principles, I respectfully DISSENT.

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[16] Of course, these approaches could fail First Amendment scrutiny if they were merely intended to mask a governmental motive to suppress protected expression. *See Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir.1985).

J & B SOCIAL CLUB # 1, INC. d/b/a The Candy Store and Jennifer Q. Bodiford,

Plaintiffs,

v.

The CITY OF MOBILE, Defendant.

Civil Action No. 96-0246-BH-S.

966 F.Supp. 1131 (S.D. ala. 1996)

United States District Court,

S.D. Alabama,

Southern Division.

October 2, 1996.

ORDER

HAND, Senior District Judge.

This consolidated action, originally filed as two cases, is before the court on plaintiff Sammy's of Mobile, Ltd.'s (hereinafter "Sammy's") motion for summary judgment (doc. 43) and plaintiffs J & B Social Club # 1, Inc. d/b/a The Candy Store (hereinafter "The Candy Store") and Jennifer Bodiford's motion for summary judgment (doc. 44). Each motion challenges the constitutionality of Ordinance 03-003, enacted by the Mobile City Council. The defendant City of Mobile has filed a cross motion for summary judgment against both sets of plaintiffs (doc. 46).

This action implicitly raises two important issues regarding governmental power: first, at what

governmental level--local, state, or federal--should issues such as liquor and nudity regulation be addressed; and second, whether these issues should be decided by legislative institutions or by the courts. In essence, the plaintiffs seek to have this court, pursuant to national authority, overturn the legislative will, expressed through its duly-elected representatives, of the City of Mobile.

The court will not approach these issues in the abstract, for this case presents a concrete controversy between the plaintiffs and the defendant. The judicial resolution of this controversy requires the application of the law, not the policy choices of presiding judge. Therefore, this ruling has nothing to say about the wisdom of the city's ordinance, only whether the ordinance is forbidden by the United States Constitution.

PROCEDURAL BACKGROUND

On February 6, 1996, the City Council of Mobile enacted Ordinance 03-003, which, at its core, bans topless dancing in bars. Sammy's filed a complaint against the city in state court which was removed to this court on February 26, 1996. The complaint alleged that the ordinance violated the First Amendment free speech clause, the Fifth Amendment "takings clause," the equal protection clause of the Fourteenth Amendment, the substantive and procedural components of the due process clause of the Fourteenth Amendment, the ex post facto clause, was void for vagueness, and finally was unenforceable under the doctrine of equitable estoppel.[1] Simultaneously with the filing of the complaint, Sammy's moved for a temporary restraining order against the enforcement of the ordinance. After an evidentiary hearing on March 1, 1996, that motion was denied on March 6, 1996.

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[1] Everything but the kitchen sink.

On March 12, 1996, The Candy Store filed a separate action against the city alleging that the same ordinance violates the First Amendment, the Fifth Amendment, is void for vagueness, is overbroad, violates the equal protection clause of the Fourteenth Amendment in that male breasts are treated differently from female breasts,[2] that the city intends to selectively enforce the ordinance, also in violation of the equal protection clause of the Fourteenth Amendment, and that the ordinance is unenforceable against The Candy Store under the doctrine of res judicata. The Candy Store, which seeks $2,000,000 in damages against the city, also filed a motion for a restraining order against the enforcement of Ordinance 03-003. After an evidentiary hearing on March 19 and 20, 1996, the court denied the plaintiffs' motion for an injunction against the city on March 26, 1996.

The two cases were consolidated under this civil action number on April 23, 1996. At a status conference meeting on August 12, 1996, the parties informed the court that they expected the issues presented in these lawsuits to involve primarily questions of law, and that the cases were amenable to summary judgment. On August 14, 1996, at the parties' requests, the court scheduled a shortened time period for the filing of summary judgment motions and responses. On September 5, 1996, the court heard oral argument from the parties on their respective motions for summary judgment. The motions are now ripe for review.

"Summary judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex*

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2 The complaint was amended to add this theory.

Corp. v. Catrett, 477 U.S. 317, 322-28, 106 S.Ct. 2548, 2552-55, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-53, 106 S.Ct. 2505, 2509-12, 91 L.Ed.2d 202 (1986). As indicated, legal issues predominate over factual ones in this action. Having reviewed the record, the court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On February 6, 1996, the Defendant City of Mobile enacted Ordinance 03-003 which, inter alia, bans topless female dancing in bars. City of Mobile Ordinance 03-003.

2. Prior to the ordinance being enacted, both plaintiffs were licensed to sell alcoholic beverages for on-premises consumption and offered topless female dancing. Dep. of Daniel Zimmern, at pp. 11-12; Trans. of Prelim. Inj. H'rg. on March 19-20, 1996, at pp. 118-120.

3. Daniel Zimmern, Vice-President of Sammy's Management Company, was notified of Ordinance 03-003 and had an opportunity to be heard at the Mobile City Council Meeting on February 6, 1996, when the ordinance was enacted. He declined to speak against the ordinance on the advice of the ordinance's legislative sponsor. Trans. of Prelim. Inj. H'rg. on March 6, 1996, at pp. 15-18, 20-23, 42.

4. Sammy's surrendered their liquor license in April, 1996. Zimmern Dep. at pp. 17, 18, 22, 23. Sammy's continues to offer expressive female dancing, though the dancers are now given the option of dancing totally nude, as well as simply topless. Zimmern Dep. at pp. 27-30 and 92-94.

5. The City of Mobile has not enforced Ordinance 03-003 against The Candy Store and Jennifer Bodiford. Letter of Slade Watson, dated August 1, 1996.

6. The city has expressed an intent to enforce the ordinance against bars offering topless female dancing, and has given no indication that it would enforce the ordinance against any other persons or entities. Trans. of Prelim. Inj. H'rg. on March 19-20, 1996, at pp. 45-46.

LEGAL CONCLUSIONS

A. FIRST AMENDMENT

Both plaintiffs claim that the city ordinance impermissibly curtails their First Amendment free speech rights. The First Amendment to the U.S. Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Although the free speech clause of the amendment makes no mention of protecting conduct from congressional regulation, the Supreme Court has held on numerous occasions that, "[W]here the government prohibits conduct precisely because of its communicative attributes, we hold the regulation unconstitutional." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 577, 111 S.Ct. 2456, 2466, 115 L.Ed.2d 504 (1991) (Scalia, J., concurring).

In its previous order of March 6, 1996, this court denied Sammy's motion for a temporary restraining order,

finding that the ordinance "falls within a long line of cases upholding the states' authority to prohibit nude dancing in clubs licensed to sell alcohol." *See e.g., New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 718, 101 S.Ct. 2599, 2601, 69 L.Ed.2d 357, 361 (1981); *City of Newport, Kentucky v. Iacobucci*, 479 U.S. 92, 107 S.Ct. 383, 93 L.Ed.2d 334 (1986); *Lanier v. City of Newton, Ala.*, 842 F.2d 253 (11th Cir.1988).

Since the entry of the March 6, 1996, order, the Supreme Court rendered a decision in *44 Liquormart, Inc. v. Rhode Island*, --- U.S. ---- 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996),[3] an unrelated First Amendment case. The plaintiffs contend that this decision "completely change[s] the 'playing field' " regarding the appropriate disposition of their First Amendment claim.[4] *44 Liquormart*, a commercial speech case, held, inter alia, that "the Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment." *id.* --- U.S. at ----, 116 S.Ct. at 1515. *Prior to 44 Liquormart*, the Court had held, in a series of cases beginning with California v. *LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), that the Twenty-first Amendment could serve to buttress the constitutionality of liquor regulations that potentially infringed upon First Amendment rights. *See e.g., LaRue*, 409 U.S. at 114, 93 S.Ct. at 395 ("[T]he broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals."); *Doran v. Salem*, 422 U.S. 922, 932, 95 S.Ct. 2561, 2568, 45 L.Ed.2d 648 (1975) ("[T]he broad powers of the States to regulate the sale of liquor,

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3 Decided May 13, 1996.

4 Plaintiff's Sammy's of Mobile, LTD., Dispositive Motion for Summary Judgment and Memorandum of Points and Authorities, at p. 4.

conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a state could therefore ban such dancing as a part of its liquor license program.") (summarizing *LaRue*); *Bellanca*, 452 U.S. at 718, 101 S.Ct. at 2602 (holding that the broad powers conferred under the Twenty-first Amendment outweighed any "artistic or communicative value" attributable to topless dancing); *Iacobucci*, 479 U.S. at 95, 107 S.Ct. at 385 (holding that the states' Twenty-first Amendment regulatory authority "includes the power to ban nude dancing as part of a liquor license program."); *Lanier*, at 255 ("[S]tate regulation adopted pursuant to the twenty-first amendment enjoys a presumption of validity.") (citing *LaRue*) (citations omitted). The suggestion in all these cases that the Twenty-first Amendment was a font of some sort of "super authority" above and beyond the considerable police powers retained by the States and which "trumped" the First Amendment when liquor regulation was at issue was clearly rejected in *44 Liquormart.*[5]

After *44 Liquormart*, the Twenty-first Amendment no longer provides an "added presumption" in favor of validity of state regulation in the area of topless dancing. However, the same Court which restricted the "broad authority" under the Twenty-first Amendment--and thus undercut the rationale of the cases cited above--went to great pains to preserve the holdings of those very cases. *44 Liquormart* states:

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[5] The inference that Twenty-first Amendment conferred a "super police power" upon the States was untenable both with the plain language of the amendment and with the foundational principle that the states delegated only certain powers to the federal government and retained all others, including the police powers, for themselves. *See e.g., The Federalist, # 45; see also U.S. Constitution, Amendment X.*

> We are now persuaded that the Court's analysis in *LaRue* would have led to precisely the same result if it had placed no reliance on the Twenty-first Amendment. Entirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations ... Without questioning the holding in *LaRue*, we now disavow its reasoning insofar as it relied on the Twenty-first Amendment.

Id., --- U.S. at ----, 116 S.Ct. at 1514. Indeed, the Court provided us with the roadmap for upholding the result in *LaRue*, citing two cases which upheld state regulation in this area without any involvement of alcoholic beverages. *id.*, --- U.S. at ----, 116 S.Ct. at 1514 (citing *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976)) (upholding a zoning ordinance separating "adult" theaters from residential neighborhoods and churches) and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (upholding an Indiana public indecency statute which applied in the context of barroom topless female dancing).

Insofar as *Glen Theatre* dealt with a nudity statute, while American Mini Theatres dealt with a zoning ordinance, it appears that the *Glen Theatre* analysis is more applicable here, although the tests under both cases are remarkably similar.[6] Before beginning with the First Amendment analysis outlined in *Glen Theatre*, it is

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[6] As the court noted in *Glen Theatre*, the "time, place, or manner" test utilized in *American Mini Theatres and Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) "has been interpreted to embody much the same standards as those set forth in *United States v. O'Brien*." *Glen Theatre*, 501 U.S. at 566, 111 S.Ct. at 2460.

appropriate[7] to point out how this case is different from *Glen Theatre*. The ordinance at issue here does not ban certain forms of nudity, as did the Indiana statute in *Glen Theatre*, it only restricts the sale of alcoholic beverages in places where certain forms of nude entertainment, most commonly topless female dancing, are offered. Counsel for Sammy's contends that the limited nature of the city's

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[7] It is also worth mentioning how the Court has traditionally gone out of its way to distinguish between political and other forms of idea- oriented speech and forms of communication involving nudity or other sexually explicit expression. For example, in *LaRue*, the court indicated that the regulations sought to be struck down were aimed at performances that "partake more of gross sexuality than of communication." *LaRue*, 409 U.S. at 118, 93 S.Ct. at 397. Later, in American Mini Theatres, after indicating that society's interest in protecting the expression of eroticism is of a "wholly different, and lesser, magnitude than the interest in untrammeled political debate," the Court noted that, "few of us would march our sons and daughters off to war to preserve the citizens right to see 'Specified Sexual Activities' exhibited in the theaters of our choice." *id.*, 427 U.S. at 70, 96 S.Ct. at 2452. In *Doran*, the Court stated in hardly a clear-cut fashion: "[A]lthough the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, we recognized in *California v. LaRue* that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances." *Doran*, 422 U.S. at 932, 95 S.Ct. at 2568 (citations omitted) (emphasis added). Finally, in the first case where the issue was squarely addressed, the court stated that, "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so." *Glen Theatre*, 501 U.S. at 565, 111 S.Ct. at 2459. Hardly a case involving potential First Amendment protection of sexually explicit communication goes by without the Court purposefully going out of its way to belittle, or at least downgrade, the very constitutional protection these same cases purport to provide. While such language is puzzling insofar as the applicable First Amendment "test" is unchanged regardless of whether the relevant speech is fully protected or only marginally protected within the outer perimeters of the First Amendment. At the very least, such equivocation ought not to engender any sense of confidence in the plaintiffs.

ordinance makes it a content-based restriction and thereby invites strict scrutiny. Sammy's argument, however, is belied by the facts of their own operation. In an effort to comply with the ordinance, Sammy's has given up its liquor license and no longer serves alcohol on its premises. Yet it continues to offer topless dancing and has even expanded its menu of artistic/expressive communication to include completely nude dancing. There is no dispute that the ideas now being communicated at Sammy's are completely legal under the ordinance. The ordinance, therefore, is not a content-based restriction on naked expressive dancing, but rather is an attempt to regulate the commingling of such expression with intoxicating beverages. In this regard, the ordinance is less restrictive of expression than the one at issue in *Glen Theatre*.

With the Twenty-first Amendment no longer involved, *Glen Theatre* instructs that the proper First Amendment analysis for cases such as this one is the four-part test developed in *U.S. v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). *O'Brien* held that expressive conduct can be validly regulated if (1) the regulation is a legitimate exercise of authority, (2) it furthers an important or substantial governmental interest, (3) the governmental interest is unrelated to the suppression of free speech, and (4) the restriction of First Amendment rights is no greater than necessary to further the government's interest.

Applying the first part of this test to the nude dancing at issue in *Glen Theatre*, the Court stated that the Indiana public indecency statute is "clearly within the constitutional power of the State." 501 U.S. at 567, 111 S.Ct. at 2461. Likewise, Alabama's police powers having

been delegated to the city of Mobile,[8] the ordinance at issue here is clearly within the city's authority to enact.

The next part of the test asks whether the regulation furthers an important governmental interest. In *Glen Theatre*, the Court noted that it was impossible to discern Indiana's purpose in passing the indecency statute, but the plurality of the court was willing to infer that the statute's purpose was the protection of societal order and morality and that the law furthered this purpose. Justice Souter, concurring, acknowledged the soundness of this inference, but nevertheless preferred to rest his concurrence on the "State's substantial interest in combating the secondary effects of adult entertainment establishments." 501 U.S. at 582, 111 S.Ct. at 2468. The city's preamble makes clear that its purpose is to discourage undesirable behavior and to protect the public health, safety, and welfare. This stated purposes combines elements of both the societal order and morality rationale as well as the discouragement of adverse secondary effects.

Counsel for both plaintiffs implicitly argue that the city's asserted interest in controlling "undesirable behavior" is really a sham. Plaintiffs contend that because no evidence of "adverse secondary effects" has been advanced by the city, the ordinance does not "further" the city's alleged interest. In short, because there has been no empirical evidence advanced by the city to justify its finding, counsel for Sammy's argues that the ordinance is "clearly content based, with no proper predicate and has resulted in nothing more than a discriminatory violation of plaintiff's civil rights." Sammy's brief, at p. 11.

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[8] *Lanier v. City of Newton, Ala.*, 842 F.2d 253 (11th Cir.1988).

It is axiomatic that the motives of individual legislators are irrelevant to the constitutional challenge here. *See e.g., O'Brien*, 391 U.S. at 383-384, 88 S.Ct. at 1681-1682. The question remains whether legislative findings must be supported by specific evidence or studies. Of course, if one assumes, as did the plurality in *Glen Theatre*, that societal order and morality are legitimate, substantial governmental interests,[9] then the city's ordinance would satisfy the second part of the *O'Brien* test. Even under Justice Souter's *Glen Theatre* concurrence, which preferred to view the governmental interest as the prevention of secondary effects, the city would not be required to advance specific evidence to justify the ordinance. Indiana's post hoc assertion in its brief that its indecency statute was aimed at controlling prostitution, sexual assaults, and other criminal activity, was enough "evidence" for Justice Souter. There was nothing in the statute, the legislative history, or the record developed in preparation for trial of any such secondary effects. *See Glen Theatre*, 501 U.S. at 567-568, 582-585, 111 S.Ct. at 2461-2462, 2468-2470. Justice Souter simply analogized the type of entertainment at issue in *Glen Theatre* to that at issue in *Renton, American Mini Theatres*, and *LaRue*. Without the benefit of any studies to justify his conclusion, Justice Souter asserted that the "live nude dancing at issue here is likely to produce the same pernicious secondary effects as the adult films displaying 'specified anatomical areas' at issue in *Renton*." 501 U.S. at 584, 111 S.Ct. at 2469. It is clear that under either the plurality or the Souter concurrence in *Glen Theatre*, there is no constitutional requirement that the

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[9] "The law is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." *Glen Theatre*, 501 U.S. at 569, 111 S.Ct. at 2462 (*citing Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986)).

city make particularized findings regarding adverse secondary effects. As the court stated in *Cafe 207*:

> Evidence about secondary effects or, rather, the lack of them, is also clearly foreclosed. It is now established as a matter of law by Supreme Court jurisprudence culminating in [*Barnes v. Glen Theatre*], that secondary effects of proscribed conduct may be taken into consideration by a court evaluating the governmental interests justifying impingement upon free speech rights even when, as in *Barnes*, there is no legislative history demonstrating that the lawmakers actually considered secondary effects or any other specific factor (such as protecting order and morality) in enacting the challenged law.

Cafe 207, Inc. v. St. Johns County, 856 F.Supp. 641, 645 (M.D.Fla.1994), aff'd per curiam, 66 F.3d 272 (11th Cir.1995), *cert. denied*, --- U.S. ----, 116 S.Ct. 1544, 134 L.Ed.2d 647 (1996). In enacting these types of laws, lawmakers may thus rely upon the experience of other cities, studies done in other cities, caselaw reciting findings on the issue, as well as their own wisdom and common sense without the courts second guessing each statute's rational basis. As the court cited with approval in *Bellanca*: "Common sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior." 452 U.S. at 718, 101 S.Ct. at 2601. Based upon the foregoing, the court concludes that the city has satisfied the second part of the *O'Brien* test.[10]

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[10] Because of its legal holding that the city need not make particularized findings of adverse secondary effects, the defendant's

The third part of the test asks whether the governmental interest is unrelated to the suppression of expression. Sammy's itself is proof that the city's aim is not to suppress the erotic message conveyed there. Even if one assumes that some measure of nudity is important to the message conveyed in artistic dancing (an assumption necessary for plaintiff's contention that the ordinance violates the First Amendment), Sammy's dancers would now be more expressive than ever before.

The fourth part of the test asks whether the government's interest is furthered by the ordinance in the least restrictive way. There is no question that the ordinance's requirement that the plaintiffs either provide some modest cover on their dancer's breasts or cease to serve alcohol is certainly a minimal restriction necessary for the furtherance of the city's interest in controlling the admixture of alcohol and nudity. As indicated above, the regulation need not moderate the expression at all. Based on the above reasons, the court concludes that summary judgment on the First Amendment claim is due to be granted in favor of the city of Mobile.

B. OVERBREADTH

Both plaintiffs, but primarily The Candy Store, assert that the ordinance is overbroad and that it could be applied to First-Amendment protected activity engaged in by people or entities other than the instant plaintiffs. In this challenge, the Candy Store seeks to invoke the expanded standing rules that apply to overbreadth First Amendment challenges. In The Candy Store's motion for a preliminary injunction, this court declined to address the overbreadth issue for reasons of justiciability. This court found that while the plaintiffs may have standing to raise

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motion to strike the affidavit of Robert Bruce Mclaughlin (doc. 48) is MOOT.

an overbreadth challenge to the ordinance, the challenge brought in this action is not ripe for review. The city has repeatedly indicated that its current intention is to apply the ordinance only to institutions with on-premises liquor licenses that present topless or otherwise nude entertainment. The contention that the ordinance applies to other activities is pure speculation given the city's interpretation and announced enforcement intentions. *See e.g., Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 503, n. 21, 102 S.Ct. 1186, 1196, n. 21, 71 L.Ed.2d 362 (1982) ("The theoretical possibility that the village will enforce its ordinance against a paper clip next to Rolling Stone Magazine, [Flipside, *Hoffman Estate, Inc. v. Village of Hoffman Estates*] 639 F.2d 373, 382 (1981), is of no due process significance unless the possibility ripens into a prosecution"). *See also Poe v. Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961). For the reasons cited above and in the court's order of March 26, 1996, the court concludes that the motion for summary judgment on the overbreadth claim is due to be granted in favor of the City of Mobile.

C. VAGUENESS

The Candy Store also asserts that the ordinance is void for vagueness. The ordinance has yet to be enforced against The Candy Store; hence, only a facial vagueness challenge is justiciable. *Diversified Numismatics, Inc. v. City of Orlando*, 949 F.2d 382, 387 (11th Cir.1991) ("Furthermore, because the Orlando ordinance has yet to be applied against the appellants, they must show that the ordinance 'is impermissibly vague in all of its applications' ") (citing *Village of Hoffman Estates*, 455 U.S. at 497, 102 S.Ct. at 1192).

As the court noted in its previous order, the ordinance clearly is not vague in all of its applications. There is no question that it prohibits topless female

dancing in a bar such as the one owned and operated by The Candy Store. In addition, topless female dancing falls squarely within the hard core of the ordinance's proscriptions. *See e.g., Broadrick v. Oklahoma*, 413 U.S. 601, 608, 93 S.Ct. 2908, 2913, 37 L.Ed.2d 830 (1973) ("Even if the outermost boundaries of s 818 may be imprecise, any such uncertainty has little relevance here, where appellants' conduct falls squarely within the 'hard core' of the statute's prescriptions"). For the above reasons and for those cited in the court's order of March 26, 1996, summary judgment on the vagueness issue is due to be granted in favor of the City of Mobile.

D. EQUAL PROTECTION/ INVIDIOUS DISCRIMINATION

The Candy Store contends that the ordinance violates the equal protection clause in that the definition of nudity in the ordinance includes female, but not male, breasts. Such a claim, however, does not necessarily raise a classification impermissibly based upon gender. "The Constitution is violated when government, state or federal, invidiously classifies similarly situated people on the basis of the immutable characteristics with which they were born." *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 477- 478, 101 S.Ct. 1200, 1208-1209, 67 L.Ed.2d 437 (1981) (Stewart, J., concurring). Thus, "while detrimental gender classifications by government often violate the Constitution, they do not always do so, for the reason that there are differences between males and females that the Constitution necessarily recognizes." *id.* It is apparent to the naked eye, and this court takes judicial notice, that female breasts are quite often different from male ones. In this regard, men and women are not "similarly situated," and the ordinance therefore raises no impermissible gender classification.

Assuming, however, that such a distinction is "gender-based" for equal protection purposes, the court finds that the distinction is substantially related to an important governmental interest. *See, e.g., U.S. v. Biocic*, 928 F.2d 112 (4th Cir.1991); *See also Craft v. Hodel*, 683 F.Supp. 289 (D.Mass.1988); *Tolbert v. City of Memphis*, 568 F.Supp. 1285 (W.D.Tenn.1983). For the above reasons, the court concludes that the motion for summary judgment on The Candy Store's equal protection claim is due to be granted in favor of the City of Mobile.

E. REMAINING CLAIMS

Sammy's has raised an equal protection argument in that topless bars are treated differently from other businesses. Without citing any authority, Sammy's contends that the ordinance violates a fundamental right and that the classification must be narrowly tailored to serve a compelling governmental interest. No such fundamental right is at issue, however, and the court finds that Sammy's challenge does not overcome rational basis equal protection review.

Sammy's has also raised procedural and substantive due process claims without citing any authority for same. As indicated previously, an individual representing Sammy's had notice of the hearing when the ordinance was passed, was present at same, heard testimony from those who supported and opposed the motion, and declined to speak on the advice of the ordinance's sponsor. Further, no statutory notice provisions were violated in enacting the ordinance, and Sammy's could cite no cases where the requirements of procedural due process would apply to this legislative enactment. For these reasons and for the reasons given in the March 6, 1996, order of this court, these claims are without merit.

Sammy's equitable estoppel claim is likewise without merit for the reasons given in the court's order of March 6, 1996.

The Candy Store's selective enforcement and res judicata claims are without merit for the reasons given in the court's order of March 26, 1996.

Both plaintiffs have raised Fifth Amendment takings claims without any attempt to show how their property has been "taken for public use." Regulations which deprive a property owner of only a portion of the economic value of his land do not rise to the level of a taking under the Fifth Amendment. *Lucas v. South Carolina*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). The plaintiffs have come forward with no evidence whatsoever to indicate that their property is no longer economically viable. This claim is likewise without merit.

For the foregoing reasons, the city's motion for summary judgment on all claims raised by the plaintiffs is due to be and hereby is GRANTED.

J & B SOCIAL CLUB, # 1, INC. d/b/a The Candy Store and Jennifer Q. Bodiford,

Plaintiffs,

v.

The CITY OF MOBILE, et al., Defendants.

Civil Action No. 96-0246-BH-S.

920 F.Supp. 1241 (S.D. Ala. 1996)

United States District Court,

S.D. Alabama,

Southern Division.

March 26, 1996.

ORDER

HAND, Senior District Judge.

The plaintiffs J & B Social Club, Inc., d/b/a The Candy Store (hereinafter "The Candy Store") and its owner Jennifer Bodiford bring this cause of action for injunctive relief and monetary damages against the City of Mobile and its city council members, public safety director, chief of police, and mayor. The action is currently before the court on plaintiffs' motion[1] for a preliminary injunction, enjoining the city from enforcing a recently enacted city ordinance (1996 Ordinance 03-003) which, at its core, bans topless dancing in bars. The

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[1] Tab 2.

action is also before the court on defendants' motions[2] to dismiss all individually named defendants, in both their individual and official capacities, except the City of Mobile.[3] This court has original subject matter jurisdiction over the claim pursuant to 28 U.S.C. s 1331.

The matter came on for hearing on the motions on March 19 and 20, 1996. At the hearing, plaintiffs requested, and both parties were granted, until Friday, March 22, 1996, to provide the court with supplemental legal memoranda. It is now ripe for review.

I. PROCEDURAL BACKGROUND AND CLAIMS

This action comes on the heels of another challenge to the constitutionality of the same ordinance, *Sammy's of Mobile, LTD. v. City of Mobile*, 96-0176-BH-M, and makes several of the same arguments as those asserted in the *Sammy's* case. In *Sammy's*, the plaintiffs raised a number of first amendment claims,[4] and also challenged the ordinance on grounds of vagueness, taking without just compensation in violation of the Fifth Amendment, and violation of substantive and procedural due process. The court will confine its review in the present case to issues which were not adjudicated in *Sammy's*.

This case presents a pre-enforcement challenge[5] to the validity of Ordinance 03-003. The theories raised by

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2 Tabs 6 and 8.

3 Plaintiffs also made an oral motion to dismiss the city council members with leave to amend the complaint to add them at a later time.

4 The plaintiffs in *Sammy's* raised the first amendment issue of overbreadth in the complaint, but did not argue overbreadth in the motion for a temporary restraining order. Consequently, the court did not specifically address overbreadth in denying that motion.

5 The city has directed its police force to withhold enforcement of the ordinance until its constitutionality can be

the plaintiffs attack the ordinance on both facial and applied grounds. First, plaintiffs argue that the ordinance is res judicata as to them and therefore unenforceable against The Candy Store. Second, plaintiffs allege that the city plans to selectively enforce the ordinance only against bars with female topless dancers in violation of the Equal Protection Clause of the Fourteenth Amendment. Third, plaintiffs argue that the ordinance invidiously discriminates against women in that it defines nudity as encompassing female and not male breasts, again in violation of the Equal Protection Clause. Fourth, the plaintiffs argue that the ordinance is void for vagueness.[6] Finally, the plaintiffs argue that the ordinance is overbroad.

To be entitled to a preliminary injunction, a movant must show: "(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction were not granted; (3) that the threatened injury outweighs the harm an injunction may cause the defendant; and (4) that granting the injunction would not disserve the public interest." *Levi Strauss & Co. v. Sunrise International Trading Inc.*, 51 F.3d 982, 985 (11th Cir.1995). "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *University of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 1834, 68 L.Ed.2d 175 (1981).

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ascertained by the courts. While there has been no actual enforcement of the ordinance, the record does reflect that, in response to a 911 call, Mobile police entered Sammy's topless bar for observation. There is no evidence that any such visits were made to the plaintiffs' establishment. To date, no arrests have been made for violation of the ordinance.

[6] This court only addressed the vagueness issue in summary fashion in the *Sammy's* case, because the plaintiffs there made no attempt to demonstrate how the ordinance was vague or even how they had standing to challenge its vagueness.

Upon review of the pleadings, the plaintiffs' briefs in support of the motion, the defendants' brief in opposition, and the evidence in the record and the oral arguments by counsel, the court finds that the plaintiffs have not demonstrated a substantial likelihood of success on the merits of their respective claims. For the reasons assigned below, the motion for a preliminary injunction in favor of the plaintiffs and against the City of Mobile is due to be and hereby is DENIED.[7]

II. DISCUSSION

While the plaintiffs' arguments are primarily directed at the constitutionality of the ordinance, the court will begin with a statutory construction argument that has nothing to do with plaintiffs' constitutional arguments per se, because, if taken at face value, the court would be obliged to dismiss this case.

At oral argument and in his post-trial brief, plaintiffs strenuously argue that the ordinance as written does not regulate female topless dancing in establishments with on-premise liquor licenses.[8] [FN8] Indeed, the plaintiffs argue that the ordinance does not forbid any actual nudity or sexual conduct in bars at all. Plaintiffs rest this argument on the prohibiting language in paragraph B of the ordinance, which proscribes, "any motion picture, show, performance, or other presentation upon the licensed premises, which, in whole or in part, depicts nudity or sexual conduct or any simulation thereof" (emphasis added). The verb "depicts," according to the plaintiffs, means that the ordinance bans only the depiction of nudity, not actual nudity, despite the fact that

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[7] It is important to note that this action is not before the court for final adjudication of the claim, but merely on a motion for a preliminary injunction. The decision of the court today does not determine or even impact upon the ultimate disposition of the case.

[8] *See, e.g.*, Plaintiffs' Post-Trial Memoranda Brief, at p. 10.

the ordinance on its face addresses "the disturbances associated with mixing alcohol and nude dancing." In other words, a performance consisting of naked dancing pictures would be illegal, but not one consisting of actual nude or topless dancers. The court declines to place this nonsensical construction on the ordinance,[9] and will address the plaintiffs' remaining claims.

A. Res Judicata

Sometime in 1991, the City of Mobile filed an action against The Candy Store seeking monetary damages and specific performance of a contract in which The Candy Store agreed not to offer topless dancing at its establishment. The Candy Store denied that it had violated a valid contract with the city and filed a counterclaim seeking $2,000,000 in damages for violation of their constitutional rights. Both the original suit and the counterclaim were dismissed upon the parties' settlement of their claims.

Plaintiffs now urge that the enforcement of the ordinance is barred by the doctrine of res judicata. This, of course, would render the rest of the plaintiffs' claims moot and, incidently, might also effectively grant the plaintiffs a monopoly over the topless bar business in Mobile.

"Res judicata, or claim preclusion, bars relitigation of matters that were litigated or could have been litigated in an earlier suit." *Manning v. City of Auburn*, 953 F.2d 1355 (11th Cir.1992). Plaintiffs, without being able to cite any legal authority, ask this court to extend the doctrine of res judicata beyond the judicial relitigation of a legal

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[9] If the court were to construe the ordinance as narrowly as the plaintiffs urge, their action for injunctive relief and $2,000,000 in damages against the city would be non-justiciable on both standing and ripeness grounds.

claim to bar the passage and enforcement of a legislative initiative. What is more, the legislative initiative of which the plaintiffs seek to bar enforcement was neither at issue or even in existence during the earlier litigation. Plaintiffs do not have a substantial likelihood of succeeding on the merits of this claim.

B. Selective Enforcement

Plaintiffs claim that the city intends to enforce the ordinance in a discriminatory and unequal manner by singling out topless bars for prosecution. Plaintiffs argue that the ordinance on its face applies to the activities of numerous other establishments. The city responds that the ordinance is not as broad as the plaintiffs believe and therefore declines to enforce it as such.

To prevail on a selective prosecution claim, the plaintiffs must show that they have been "singled out for prosecution while others similarly situated and committing the same acts have not been prosecuted." *Fillingim v. Boone*, 835 F.2d 1389, 1399 (11th Cir.1988). Plaintiffs must also show that the government prosecuted them invidiously or in bad faith. *id.*, at p. 1399. "The invidiousness requirement is satisfied only if it can be established that the government's selective prosecution is motivated by constitutionally impermissible motives such as racial or religious discrimination or interference with the legitimate exercise of constitutional rights." *Lanier v. City of Newton*, 842 F.2d 253 (11th Cir.1988).

In the present case, plaintiffs present a pre-enforcement challenge. Other than a police visit to a different topless bar, the city has not yet attempted to enforce this ordinance. Plaintiffs' only damages, if any, result from the passage of the ordinance and its expected enforcement. To the extent plaintiffs may have suffered these damages, there is no causal connection between

such damages and their claim of selective enforcement. Plaintiffs' selective enforcement claim is therefore not yet ripe for adjudication.[10] *See, e.g., Diversified Numismatics, Inc. v. City of Orlando*, Fl., 949 F.2d 382, at 388-390 (11th Cir.1991).

C. Invidious Discrimination

As evidence for their selective enforcement claim, plaintiffs contend that the city has stated that it does not intend to enforce the ordinance against bars that allow male topless dancing. Since the ordinance does not say anything about male topless dancing in bars, the failure to enforce it against this activity has nothing to do with a selective enforcement claim under the Fourteenth Amendment. Rather, the plaintiffs' claim here, as set out only in their oral argument and post-trial brief, is one of invidious gender discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.

Plaintiffs have not adequately raised this claim in their complaint or in their motion for a preliminary injunction. The only portion of their complaint which might be said to relate in any manner to gender discrimination is in Section IId, wherein the plaintiffs list a number of hypothetical questions. Among these questions is the following: "On what rational basis may the ordinance discriminate between the male and female breast?"[11] This is the only question in the series which

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[10] Plaintiffs have another problem with their selective enforcement claim. The court can dismiss an indictment on a selective prosecution claim, but it cannot invalidate the statute itself. Even if the court could reach this claim and plaintiffs were found to be likely to succeed on the merits, the court could not grant the plaintiffs the remedy they seek, non-enforcement. The court could only require the city to enforce the ordinance equally against all others similarly situated to the plaintiffs. *See e.g., Geaneas v. Willets*, 911 F.2d 579, at 587 (11th Cir.1990).

[11] See Complaint, P 16(g), p. 10.

mentions discrimination at all, and it is raised not in the context of a gender discrimination claim but in support of plaintiffs' arguments on vagueness and overbreadth. Moreover, "rational basis" is not the relevant test for gender discrimination under the Equal Protection Clause. If the plaintiffs wish the court to rule on this issue, they must ask for leave of court to amend their complaint. *See generally* Fed.R.Civ.P. 15.

D. Vagueness and Overbreadth

In contrast to their gender discrimination claim, plaintiffs raise specific claims of vagueness and overbreadth in their complaint and in their motion for a preliminary injunction. Plaintiffs' challenge here is primarily a facial one; they state that, "The Ordinance does not contain any severability or savings clause, and consequently Plaintiffs contend that the Ordinance must stand or fall in its entirety." *See* Complaint (tab 1), P 18 and Motion for a Preliminary Injunction (tab 2), P 17.

Vagueness and overbreadth are separate claims. Strictly speaking, a vagueness claim arises under the due process clause of the Fourteenth Amendment. The vagueness doctrine, "incorporates notions of fair notice or warning. Moreover, it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.' " *Smith v. Goguen*, 415 U.S. 566, 571, 94 S.Ct. 1242, 1247, 39 L.Ed.2d 605 (1974). On the other hand, a statute is overbroad when, though it is designed to regulate or prohibit activities which are not constitutionally protected, it also includes within its scope activities which are protected by the First Amendment. When first amendment rights are involved, as they are here, the claims of vagueness and overbreadth necessarily overlap, though the claims are still distinct. The court will therefore treat these two claims separately.

i. Vagueness

"Words inevitably contain germs of uncertainty." *Broadrick v. Oklahoma*, 413 U.S. 601, 608, 93 S.Ct. 2908, 2913, 37 L.Ed.2d 830 (1973). In analyzing a vagueness claim, the Court has indicated that, "there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." *id.*, at p. 608, 93 S.Ct. at p. 2914, (explaining that s 818 of the Hatch Act was not unconstitutionally vague) (emphasis added).

"A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to others." *Village of Hoffman Estates, et al., v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495, 102, S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982). As applied to them, plaintiffs' claim of vagueness[12] is not ripe because the statute has yet to be enforced against them. Because plaintiffs have raised their challenge prior to enforcement, only a facial challenge is justiciable.[13] *See Diversified Numismatics, Inc. v. City of Orlando, Fl.*, 949 F.2d 382, 387 (11th Cir.1991) ("Furthermore, because the Orlando ordinance has yet to be applied against the appellants, they must show that the ordinance 'is impermissibly vague in all of its applications' ") (*citing Village of Hoffman Estates*, 455 U.S. at 497, 102 S.Ct. at 1192).

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[12] Among the terms in the ordinance the plaintiffs claim to be unconstitutionally vague are the following: "opaque covering," "pubic area," and "buttocks."

[13] Plaintiffs have no way of predicting which aspects of the ordinance may be applied against them or not. Therefore, they must argue that the ordinance is vague in every respect.

As for the plaintiffs' claim of facial vagueness, the ordinance clearly is not vague in all of its applications. There is no question that it prohibits topless female dancing in a bar such as the one owned and operated by the plaintiffs. Moreover, topless female dancing, an activity offered by the plaintiffs, falls squarely within the hard core of the ordinance's proscriptions. *See e.g., Broadrick*, 413 U.S. at 608, 93 S.Ct. at 2913-14. The plaintiffs are not substantially likely to succeed on the merits of their vagueness claims.

ii. Overbreadth

Plaintiffs' main contention is that the ordinance is overbroad; that is, it criminalizes some activity protected by the First Amendment in an unconstitutional manner.[14] Specifically, plaintiffs claim that the ordinance criminalizes the presentation of magazines or posters with topless women or otherwise nude persons in both on-premise and off-premise liquor licensees. Plaintiffs have entered a number of such magazines and posters into the record of this case, ranging from completely nude pornography to pictures of artwork in Harper's Bazaar.

Unlike a vagueness challenge, the Supreme Court has recognized an exception to the traditional standing requirements of parties raising overbreadth challenges, due to the chilling effect on free speech an overbroad statute may have. Broadrick, 413 U.S. at 610-613, 93 S.Ct. at 2915-16. The court has characterized this departure from the standing requirement as "strong medicine," which is to be applied "sparingly" by the Court

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[14] This court has already stated that, "the Mobile ordinance falls within a long line of cases upholding the states' authority to prohibit nude dancing in clubs licensed to sell alcohol." *Sammy's of Mobile, Ltd. v. City of Mobile*, 96-0176, Order of March 6, 1996, at p. 7. Therefore, the court will not address the plaintiffs' first amendment overbreadth argument to the extent that it involves topless dancing.

and not when "a limiting construction has been or could be placed on the challenged statute." Broadrick, 413 U.S. at 613, 93 S.Ct. at 2916. Plaintiffs therefore have standing to challenge the overbreadth of the ordinance on the grounds that it may criminalize, for example, the sale of Harper's Bazaar or Sport's Illustrated in a typical grocery store licensed to sell beer or wine.

Although this court is prepared to construe the ordinance in a manner which does not implicate first amendment rights,[15] it declines to do so here, again for reasons of justiciability. The plaintiffs have standing to raise their overbreadth claim, but such overbreadth claim is still not ripe.[16] *See Village of Hoffman Estates*, 455 U.S. at 503, n. 21, 102 S.Ct. at 1196, n. 21 ("The theoretical possibility that the village will enforce its ordinance against a paper clip next to Rolling Stone Magazine, 639 F.2d, at 382, is of no due process significance unless the possibility ripens into a prosecution"). *See also Poe v. Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961). There is simply no current threat of enforcement of this ordinance against either those licensed only for sale of alcoholic beverages for off-premises consumption or against those establishments licensed for on- premises consumption and who sell or present nude magazines or posters. The city has repeatedly stated that it currently intends to enforce the ordinance against bars that engage in topless dancing, nothing more. Plaintiffs may not force an adjudication of a constitutional question on the highly speculative possibility that the city might prosecute

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[15] It does not take a rocket scientist to interpret this ordinance, and any reasonably intelligent person applying common sense would not read it as broadly as urged by the plaintiffs.

[16] No state court has had the opportunity to construe the meaning of the ordinance at issue here. In addition to the justiciability argument, the court is also mindful of the principle of comity, which mitigates against a federal court construing a state statute before the state courts have had the opportunity to do so.

grocery stores for selling magazines containing nude art or skimpy swimsuits. Such a ruling would amount to an advisory opinion in violation of Article III. Because the court declines to reach this issue, it finds that the plaintiffs have not demonstrated a substantial likelihood of success on the merits.

III. CONCLUSION

For the foregoing reasons, the plaintiffs' motion for a preliminary injunction is DENIED.

Additionally, at oral argument, counsel for the plaintiffs indicated that he was not sure whether plaintiff had a right of recovery against any of the individually named defendants, other than the City of Mobile. The defendants' motions to dismiss all the named plaintiffs except the city are GRANTED. Plaintiffs may file for leave of court to amend the complaint to add some or all of the defendants if it can show how recovery against them would be possible given the 11th Circuit's interpretation of the law on qualified immunity.

SO ORDERED.

SAMMY'S OF MOBILE, LTD., and Sammy's Management Company, Inc., Plaintiffs,

v.

CITY OF MOBILE, Defendant.

Civil Action No. 96-0176-BH-M.

928 F.Supp. 1116 (S.D. Ala. 1996)

United States District Court,

S.D. Alabama,

Southern Division.

March 6, 1996.

ORDER

HAND, Senior District Judge.

This action is before the court on plaintiffs' motion for a temporary restraining order (TRO)[1] against the city of Mobile enjoining it from enforcing a recently enacted ordinance banning, among other things, topless dancing in establishments licensed to sell alcoholic beverages. The plaintiffs own and manage Sammy's, an ABC licensee which offers its patrons a combination of adult beverages and bare-breasted female dancing as entertainment.

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[1] The parties have extensively briefed the issues raised by this TRO motion, they have presented arguments and evidence to the court at a hearing, and the city has voluntarily withheld enforcement of the ordinance pending this order. Consequently, the TRO motion has the effect of a motion for a preliminary injunction. *See Haitian Refugee Center, Inc. v. Baker*, 950 F.2d 685 (11th Cir.1991).

The plaintiffs filed a complaint and a motion for a temporary restraining order in the Circuit Court of Mobile County on February 22, 1996. Before the Circuit Court had an opportunity to rule on the TRO motion, the action was removed to this court on February 26, 1996 pursuant to 28 U.S.C. s 1441. Since the case arises under a number of federal constitutional issues, this court has original subject matter jurisdiction over the claim pursuant to 28 U.S.C. s 1331.

The action came on for hearing on February 29, 1996. At the hearing, both parties requested additional time to provide the court with supplemental briefs on specified legal issues.[2] The court granted the parties until Tuesday, March 5, 1996 to file additional legal argument. By previous arrangement of the parties, the defendant agreed to forego enforcement of the ordinance until this court could make a ruling upon the issues raised by the TRO motion.

"To be entitled to a TRO, a movant must show: (1) a substantial likelihood of ultimate success on the merits; (2) the TRO is necessary to prevent irreparable injury; (3) the threatened injury outweighs the harm the TRO would inflict on the non-movant; and (4) the TRO would serve the public interest." *Ingram v. Ault*, 50 F.3d 898 (11th Cir.1995).[3] The purpose of a TRO is to maintain the status quo between the parties and to prevent irreparable harm pending a trial on the merits of the case; it is not a decision on the ultimate disposition of the law suit. *McArthur v. Firestone*, 817 F.2d 1548 (11th Cir.1987). The decision to grant a TRO is within the

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[2] Defendant originally objected to the granting of additional time for plaintiff to further brief the due process issue; however, counsel for the defendant removed his objection upon learning of the court's desire to see further briefing on the takings issue.

[3] Virtually the same standards apply to preliminary injunctions.

broad discretion of the trial judge. *Majd-Pour v. Georgiana Community Hospital, Inc.*, 724 F.2d 901 (11th Cir.1984).

In support of his TRO motion, plaintiff raises several constitutional challenges to the ordinance: violation of freedom of speech under the First Amendment; vagueness; taking property without just compensation in violation of the Fifth Amendment; and violation of substantive and procedural due process under the 14th Amendment. The plaintiff also claims legal reliance upon the city's previous granting of its liquor license under the doctrine of equitable estoppel. The court will begin with an analysis of the plaintiff's First Amendment claims.

A. FREEDOM OF SPEECH

The First Amendment to the U.S. Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[4]

Although the free speech clause of the amendment makes no mention of protecting conduct from

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[4] The First Amendment has been applied to the States by action of the Fourteenth Amendment, despite evidence that the ratifiers of the Fourteenth Amendment did not intend for the First Amendment to be so applied. *See McClellan, J., Christianity and the Common Law, in Joseph Story and the American Constitution*, at p. 154 ("A conclusive argument against the incorporation theory, as least as respects the religious provisions of the First Amendment, is the 'Blaine Amendment' proposed in 1875)."

congressional regulation, the Supreme Court has held on numerous occasions that, "[W]here the government prohibits conduct precisely because of its communicative attributes, we hold the regulation unconstitutional." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 577, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (Scalia, J., concurring).

The Supreme Court recently held that barroom nude dancing is protected by the first amendment, even though the statute at issue was a general prohibition of nudity in public places and not directed against nude dancing per se.[5] *Glen Theatre*, Inc., *id.* at p. 565-566, 111

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[5] It is doubtful that the Framers of our Constitution ever would have considered dancing in the nude at the local bar to be "speech" entitled to First Amendment protection. The language of the amendment is clear; it prohibits infringement upon "freedom of speech " (emphasis added). On its face, the free speech clause of the First Amendment does not reach conduct.

The judge-made distinction between conduct which involves enough of a communicative element to be protected by the First Amendment and that which does not is not always readily ascertainable, if ever. The result often is an unwarranted micro-management of the law of expression.

The raising of an eyebrow is an action that communicates an idea. The aroma of good food conveys a message also and can even invite a powerful human response. Indeed, all voluntary action can imply some sort of an idea, even if it is only the view that such action is appropriate to the circumstances. But to call all voluntary activity "expressive" for First Amendment purposes would reduce the concept of expression to the point of being meaningless. *Barnes* v. *Glen Theatre*, Inc., 501 U.S. at 581, 111 S.Ct. at 2468 (Souter, J., concurring). How is a judge to decide when First Amendment protection attaches?

In the context of nude dancing, it has been suggested that when dancing is done as a performance and where the dancer is nude or nearly so, a feeling of eroticism and an endorsement of erotic experience is expressed. The combination of nudity with the expressive activity of performance dance serves to enhance the force

S.Ct. at p. 2459-2460. In so holding, the Supreme Court relied upon several earlier cases which had suggested that certain types of naked dancing contain enough of a communicative element to be protected to some extent by the First Amendment. In *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932, 95 S.Ct. 2561, 2568, 45 L.Ed.2d 648 (1975), the court characterized customary nude barroom dancing as potentially having the "barest minimum" of First Amendment protection in some circumstances. (Citing *California v. LaRue*, 409 U.S. 109, 118, 93 S.Ct. 390, 397, 34 L.Ed.2d 342 (1972)). *See also Schad v. Mount Ephraim*, 452 U.S. 61, 66, 101 S.Ct. 2176, 2181, 68 L.Ed.2d 671 (1981) (stating that, "as the state courts in

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of the activity's expressive nature. *id.*, at 581, 111 S.Ct. at 2468 (Souter, J., concurring).

Other forms of dancing may express some sort of feeling or meaning other than eroticism. Does this entitle them to First Amendment protection? If not, why not? See e.g., Dallas v. Stanglin, 490 U.S. 19, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989) (recreational dance not entitled to First Amendment protection).

Is there anything in the First Amendment that entitles eroticism conveyed by nude dancing to more protection than any other message or idea conveyed by different human conduct? When judges make these distinctions, they inevitably make some judgment upon the content of the conduct's message.

If it is not the content, but the force of the message that we view as important, would the result in Dallas have been different if the dancing participants there were allowed to dance naked? Surely the message conveyed by recreational dancing takes on added force and even added meaning when the parties do so in the nude.

Without clear cut distinctions between laws which seek to regulate conduct and laws which seek to regulate speech, the courts will continue to be asked to micro manage the law of expression in ways they are ill-equipped to do. Constitutional amendment, not judicial rewriting is the remedy designed by our Framers for those not satisfied by straightforward interpretation of the Constitution.

this case recognized, nude dancing is not without its First Amendment protections from official regulation.") (citations omitted). The court in *Glen Theatre* was careful to limit the scope of its holding, stating that, "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so." *Glen Theatre, Inc.*, 501 U.S. at 566, 111 S.Ct. at 2460.[6]

A determination that the First Amendment applies to the topless dancing at issue in this case is only the first prong of the court's inquiry. The second prong entails what level of protection is to be afforded the expressive conduct at issue.[7]

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[6] According to the Supreme Court, not all dancing is entitled to protection. The Supreme Court has held that recreational soul and "funk" music dancing is not protected by the First Amendment. *Dallas v. Stanglin*, 490 U.S. 19, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989). Aerobic dancing likewise appears to have no first amendment protection. *Barnes* v. *Glen Theatre*, Inc., 501 U.S. 560, 581, 111 S.Ct. 2456, 2468, 115 L.Ed.2d 504 (Souter, J., concurring). Additionally, nude dancing that constitutes obscenity would not be entitled to first amendment protection.

[7] Despite the plain wording of the First Amendment, the courts have created multiple tiers of scrutiny to apply to regulations affecting freedom of speech. Under the court's jurisprudence, a judge is required to determine the relative importance of the government's interest in a regulation affecting speech (or expressive conduct) and to determine whether such regulation is the least restrictive possible to advance or protect the governmental interest. Thus the courts must balance the parties' competing interests in order to determine which side will prevail. In many cases, even when the court believes a First Amendment interest is at stake, the courts have held that the regulation is valid because of the relative importance of the government's interest in the regulation. This sort of balancing is not only unfaithful to the plain words of the First Amendment, it invites and necessitates judicial policy making that is not a valid exercise of the Article III power.

In *LaRue*, the Supreme Court concluded that, "the broad powers of the States to regulate the sale of liquor, conferred by the Twenty- first Amendment, outweighed any First Amendment interests in nude dancing and that a State could therefore ban such dancing as part of the liquor license control program." *Doran*, 422 U.S. at 932-933, 95 S.Ct. at 2567-2569. "Whatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty- first Amendment."[8] *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 718, 101 S.Ct. 2599, 2602, 69 L.Ed.2d 357, 361 (1981).

The State of Alabama has delegated its police powers recognized by the Twenty-first Amendment to its localities. *See Lanier v. City of Newton*, 842 F.2d 253 (11th Cir.1988) (see appendix, answer to certified question). As result, the Mobile ordinance falls within the long line of cases upholding the states' authority to prohibit nude dancing in clubs licensed to sell alcohol. *See Bellanca; City of Newport, Kentucky v. Iacobucci*, 479 U.S. 1047, 107 S.Ct. 913, 93 L.Ed.2d 862; *Lanier, Fillingim v. Boone*, 835 F.2d 1389 (11th Cir.1988); *Grand Faloon Tavern, Inc., v. Wicker*, 670 F.2d 943 (11th Cir.1982). Consistent with this authority, Mobile's interest in regulating nudity in places where alcohol is served

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[8] Upon passage of the federal Constitution, the States retained their general police power over health, safety, welfare, and morals. *See e.g., The Federalist, # 45*. The application of the police power may be limited or prohibited by various provisions of the Constitution, but the police power itself remains with the States. The Twenty-first Amendment does not confer upon the States alcohol-regulating authority per se; it merely makes clear that other sections of the Constitution, e.g., the Commerce Clause, do not serve to limit the States' legitimate exercise of their own police power in the manner they ordinarily might if the Twenty-first Amendment did not exist.

outweighs whatever First Amendment interest that applies to nude dancing.[9]

B. LEGISLATIVE FINDINGS

Plaintiffs strenuously argue that the ordinance is unconstitutional because the factual basis for the preamble[10] has been questioned. Plaintiffs further argue that the city hasn't met its burden of making sufficient legislative findings which demonstrate the ill effects that

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9 Plaintiffs assert that the four-part test developed in *U.S. v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) is applicable to the ordinance in this case. *O'Brien* held that expressive conduct can be validly regulated if (1) the regulation is a legitimate exercise of authority, (2) it furthers an important or substantial governmental interest, (3) the governmental interest is unrelated to the suppression of free speech, and (4) the restriction of first amendment rights is no greater than necessary to further the government's interest. However, *O'Brien* does not apply because the ordinance here was passed pursuant to Mobile's authority to regulate the sale of alcoholic beverages pursuant to the Twenty-first Amendment. *See California v. LaRue*, 409 U.S. at 116, 93 S.Ct. at 396.

10 The preamble to the Ordinance states:

WHEREAS, the City Council of the City of Mobile, Alabama, finds and declares that nudity and sexual conduct and depiction thereof, coupled with alcohol in public places, encourages undesirable behavior and is not in the interest of the public health, safety, and welfare.

WHEREAS, the Council has chosen to avoid the disturbances associated with mixing alcohol and nude dancing by means of a reasonable restriction upon establishments which sell spirituous or vinous liquors or malt or brewed beverages.

NOW THEREFORE, the Council adopts this Ordinance pursuant to the powers under the Twenty-first Amendment to the Constitution of the United States delegated to it by the State of Alabama.

accompany the commingling of nudity and alcohol in establishments licensed to sell liquor. Plaintiffs urge the court to apply the judicial scrutiny applied in *Grand Faloon* and *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir.1985). However, those cases involved ordinances enacted pursuant to the municipality's police power; the broader police power of the State involving alcohol regulation recognized and protected by the Twenty-first Amendment was not at issue. The Supreme Court in *Bellanca* held that "even if explicit legislative findings were required to uphold the constitutionality of this statute as it applied to topless dancing," the legislative purposes set out in a memorandum accompanying the statute were sufficient. Bellanca, 452 U.S. at 717-718, 101 S.Ct. at 2601-2602. In *Lanier*, the court noted:

> Because the ordinance in this case was adopted pursuant to authority derived from the twenty-first Amendment, rather than from the municipality's police power, "extensive and detailed legislative findings based upon substantial evidence that the prohibited activity contributed to criminal activity in the county are not required."

Lanier, 842 F.2d at 255 (citing Fillingim, 835 F.2d at 1397). If legislative findings are at all necessary when states or municipalities act pursuant to the Twenty-first Amendment, the requirement is minimal and easily met by the city's findings set forth in the preamble to the ordinance. The plaintiffs arguments in this regard are without merit.

C. DUE PROCESS

Plaintiffs next assert that the City Council's manner of enacting the ordinance deprived them of

procedural due process.[11] [FN11] Specifically, plaintiffs contend that they were denied notice of the meeting where the ordinance was adopted and an opportunity to be heard. Plaintiffs make no contention that the manner in which the City Council passed the ordinance in question violated any statutory notice requirements.

The Fourteenth Amendment provides that no State shall deprive a person of life, liberty, or property without due process of law. Procedural due process refers to the requirement that an individual be given notice and an opportunity to be heard before any judicial, executive, or administrative action deprives him of a liberty or property interest. Procedural due process typically does not apply to legislative action because it is assumed that the "process" which is "due" is merely the employment of the procedures necessary to validly pass the law in question. For example, Congress may not pass a bill without a majority vote in both houses. There is no constitutional requirement that Congress or state legislatures provide notice and an opportunity to be heard to individuals whose liberty or property is affected by legislative action. If the people are unhappy with the manner in which Congress enacts legislation, their remedy is with the ballot box, not the courthouse.

There is no question that the City Council exercised legislative authority in passing the ordinance. The Alabama Supreme Court has made clear that Alabama has delegated its police powers pursuant to the Twenty-first Amendment to its municipalities. *See Lanier v. City of Newton*, 518 So.2d 40 (Ala.1987). The ordinance itself states that the City is exercising such power. The ordinance has the effect of any general law; it

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[11] Plaintiffs also contend that the ordinance violates their substantive due process rights. This claim has no merit.

is not subject to the requirements of procedural due process.[12] *Cf. Crymes v. DeKalb County, Ga.*, 923 F.2d 1482, 1485 (11th Cir.1991) ("It is clear that if the Commissioners were performing a legislative function in voting to deny *Crymes* a development permit, they would be entitled to absolute immunity from suit").

D. REMAINING CLAIMS

Plaintiffs equal protection claim raises no suspect classification. Because the ordinance was passed pursuant to the state's legitimate police powers recognized by the Twenty-first Amendment and delegated to the municipalities, this claim is additionally unlikely to succeed on the merits.

Plaintiffs argue that the ordinance is unconstitutionally vague, but have made no attempt, other than conclusory statements, to demonstrate how the ordinance is vague. Upon reviewing the plaintiffs' arguments and the ordinance itself, the court concludes that the plaintiffs have not demonstrated any likelihood of success on the merits of this claim.

Regarding plaintiffs' equitable estoppel claim, the Alabama Supreme Court has held that the legislature has the right under the State Constitution to change the laws regulating intoxicating liquors at any time. *Ebony Club, Inc. v. State of Alabama*, 318 So.2d 282 (1975). The court

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[12] Even if the ordinance were subject to attack on procedural due process grounds, the court does not believe that the plaintiffs would be likely to prevail on the merits of the issue of how much process is due. The plaintiffs not only had notice of the hearing where the ordinance was passed, but were actually present, heard testimony from individuals who opposed its passage, and declined to speak personally against the measure apparently on the advice of the ordinance's sponsor. Clearly, at least some notice and opportunity to be heard was given by the City Council.

concludes that the plaintiffs have not demonstrated a likelihood of success on the merits of this claim.

Finally, plaintiffs appear to have waived their fifth amendment takings claim. *See* Plaintiffs' Supplemental Memorandum of Law in Support of the Issuance of a Temporary Restraining Order or Preliminary Injunction, at p. 5 ("Plaintiffs' concede that because, under Alabama law, there is no property interest in an alcoholic beverage permit, there can be no just compensation claim"). Even without this waiver, the court does not believe that the plaintiffs have met their burden of showing a likelihood of prevailing on the merits of this claim.

Plaintiffs have made an initial showing that their business will suffer no small amount of economic harm if the ordinance is enforced. However, the Supreme Court has made clear that regulations which deprive a property owner of only a portion of the economic value of his land do not rise to the level of a "taking" under the Fifth Amendment. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). The plaintiffs have not demonstrated that their property will be rendered worthless by the ordinance. Further, the plaintiffs claim of irreparable injury with regard to this claim is likewise suspect since the recovery allowed for a "taking" is "just compensation," for which there is an adequate remedy at law.

For the foregoing reasons, the plaintiffs' motion for a temporary restraining order or preliminary injunction is hereby DENIED.

SO ORDERED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-7073

SAMMY'S OF MOBILE, LTD., AN ALABAMA LIMITED PARTNERSHIP; SAMMY'S MANAGEMENT COMPANY, INC., AN ALABAMA CORPORATION,

Plaintiffs-Appellants,

versus

CITY OF MOBILE, A BODY CORPORATE AND POLITIC,

Defendant-Appellee.

J & B SOCIAL CLUB, # 1, INC., D.B.A. THE CANDY STORE, JENNIFER Q. BODIFORD: SAMMY'S OF MOBILE, LTD. AN ALABAMA LIMITED PARTNERSHIP,

Plaintiffs-Appellants,

versus

CITY OF MOBILE, ALA.,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Alabama

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ___F.2d ___)

Before: BIRCH, Circuit Judge, and HILL and KRAVITCH, Senior Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ James C. Hill
SENIOR UNITED STATES CIRCUIT JUDGE

Filed August 5th, 1998

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

November 4, 1998

Mr. Luke Charles Lirot
112 East Street
Suite B
Tampa, FL 33602

Re: Sammy's of Mobile, Ltd. et al.
v. City of Mobile, Alabama
Application No. A-377

Dear Mr. Lirot:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on November 4, 1998, extended the time to and including December 18, 1998.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, CLERK
By

/s/ Sandra Elliott Spagnolo
Sandra Elliott Spagnolo
Assistant Clerk

03 – 003 1996

AN ORDINANCE PROHIBITING NUDITY AND SEXUAL CONDUCT IN ESTABLISHMENTS LICENSED TO SELL ALCOHOLIC BEVERAGES

Sponsored by: Reggie Copeland

WHEREAS, the City Council of the City of Mobile, Alabama, finds and declares that nudity and sexual conduct and depiction thereof, coupled with alcohol in public places, encourages undesirable behavior and is not in the interest of the public health, safety, and welfare.

WHEREAS, the Council has chosen to avoid the disturbances associated with mixing alcohol and nude dancing by means of a reasonable restriction upon establishments which sell spirituous or vinous liquors or malt or brewed beverages.

NOW, THEREFORE, the Council adopts this Ordinance pursuant to the powers under the Twenty-first Amendment to the Constitution of the United States delegated to it by the State of Alabama.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MOBILE, ALABAMA, as follows:

A. The following words and terms when used in this ordinance, shall, for the purpose of this ordinance have the meanings respectively ascribed to them by this section.

1. "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque

covering of any portion thereof below the top of the darkened area surrounding the nipple, or the depiction of covered male genitals in a discernibly turgid state.

2. "Sexual Conduct" means the performance of acts, or simulated acts, of masturbation, homosexuality, sodomy, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or if such person be a female, her breast.

3. "Knowingly" means having actual or constructive knowledge of the character and content of the subject matter. A person has constructive knowledge if a reasonable inspection under the circumstances would disclose the nature of the subject matter and the failure to inspect for the purpose of avoiding such disclosure.

B. It shall be unlawful for any manager, officer, agent, servant, employee or person in charge of any establishment within the City of Mobile or the police jurisdiction thereof, licensed to sell spirituous or vinous liquors or malt or brewed beverages under the laws of the State of Alabama, knowingly to exhibit, suffer, allow, permit, engage in, participate in, or be connected with, any motion picture, show, performance, or other presentation upon the licensed premises, which, in whole or in part, depicts nudity or sexual conduct or any simulation thereof.

C. Any person, firm or corporation convicted for violating this ordinance shall be fined not more than $500.00 and sentenced to imprisonment for a period not

exceeding six months, at the discretion of the court trying the case.

Adopted: FEB 6, 1996

/s/ Glendi A. Morgan

City Clerk

Supreme Court, U.S.
FILED
FEB 16 1999
CLERK

(2)

No. 98-994

In The

Supreme Court of the United States

October Term, 1998

SAMMY'S OF MOBILE, ET AL.,

Petitioners,

v.

CITY OF MOBILE, ALABAMA,

Respondent.

On Petition For Writ Of Certoriari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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February 15, 1999

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COUNTER-QUESTION PRESENTED FOR REVIEW

Respondent disagrees with Petitioners' Questions Presented for Review. The sole question presented for review is whether this Court should exercise its discretion to grant the Petition, when the Petitioner has not shown that the Court of Appeals has decided an important question of law in conflict with relevant decisions of this Court or other Courts of Appeal.

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STATEMENT OF THE CASE

Respondent disagrees with Petitioners' Statement of the Case to the extent that it is argumentative and contains facts immaterial to the question presented for review.

A. Statement of Facts.

On February 6, 1996, the Mobile City Council adopted Ordinance 03-003, which bans adult entertainment, including nude or topless female dancing, in establishments licensed to sell alcoholic beverages. The Ordinance provides:

> It shall be unlawful for any manager, officer, agent, servant, employee, or person in charge of any establishment within the City of Mobile or the police jurisdiction thereof, licensed to sell spiritous or vinous liquors or malt or brewed beverages under the law of the State of Alabama, knowingly to exhibit, suffer, allow, permit, engage in, participate in, or be connected with, any motion picture, show, performance, or other presentation upon the licensed premises, which, in whole or in part, depicts nudity or sexual conduct or any simulation thereof.[1]

---

[1] The Ordinance defines "nudity" as:

> [T]he showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the darkened area surrounding the nipple, or the depiction of covered male genitals in a discernably turgid state.

The preamble to the Ordinance provides:

> WHEREAS, the City Council of the City of Mobile, Alabama, finds and declares that nudity and sexual conduct and depiction thereof, coupled with alcohol in public places, encourages undesirable behavior and is not in the interest of the public health, safety, and welfare.
>
> WHEREAS, the Council has chosen to avoid the disturbances associated with mixing alcohol and nude dancing by means of a reasonable restriction upon establishments which sell spiritous or vinous liquor or malt or brewed beverages.
>
> NOW, THEREFORE, the Council adopts this Ordinance pursuant to the powers under the Twenty-first Amendment to the Constitution of the United States delegated to it by the State of Alabama.

City of Mobile, Ala. Ord. 03-003.

At the time the Ordinance was adopted, the Petitioners were licensed to sell alcoholic beverages and offered topless female dancing on their premises. The Petitioners Sammy's of Mobile, Ltd., and Sammy's Management Company, Inc. (collectively referenced as "Sammy's") thereafter surrendered their liquor license and continued to offer female topless, as well as totally nude, dancing. The Petitioners J & B Social Club #1, doing business as "The Candy Store" and its owner Jennifer Bodiford (collectively referenced as "The Candy Store") did not surrender their license and continues to provide topless dancing. City officials have expressed an intent to enforce the ordinance against bars offering

topless female dancing, nothing more. (Pet'rs Appendix to Pet. for Writ of Cert. ("App.") 39a and 63a).[2]

B. Course of Proceedings and Dispositions in the Courts Below.

The Petitioners filed two separate actions against the City of Mobile ("City") arising out of the February 6, 1996 enactment of City Ordinance 03-003 ("Ordinance").

I. Petitioner Sammy's.

On February 22, 1996, Sammy's filed a complaint and a motion for a temporary restraining order against the City in state court. Sammy's alleged, *inter alia*, that the Ordinance violated its protections under First Amendment to the United States Constitution.

On February 26, 1996, the case was removed to the United States District Court for the Southern District of Alabama pursuant to 28 U.S.C. § 1441. The District Court heard Sammy's motion on February 29, 1996. (App. 66a). On March 6, 1996, the District Court denied Sammy's motion. *Sammy's of Mobile, Ltd. v. City of Mobile*, 928 F.Supp. 1116 (S.D.Ala. 1996) (App. pp. 65a-76a).

---

[2] The case at bar arose in the context of a pre-enforcement challenge. Mobile has repeatedly stated it only intends to enforce the ordinance against topless bars. Accordingly, the District Court declined to consider an overbreadth challenge because it is not yet ripe, citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 503 n.1 (1982) and *Poe v. Ullman*, 367 U.S. 497 (1961).

II. Petitioner The Candy Store.

On March 12, 1996, The Candy Store filed a complaint and a motion for injunctive relief in the District Court. This complaint likewise alleged, *inter alia*, that the Ordinance violates the First Amendment.

The District Court held a hearing on The Candy Store's injunctive motion on March 19 and 20, 1996. (App. p. 54a). On March 26, 1996, the District Court denied The Candy Store's motion for injunctive relief. *J & B Social Club, #1, Inc. v. City of Mobile*, 920 F.Supp. 1241 (S.D.Ala. 1996) (App. 53a-64a).

III. Consolidated Cases.

The District Court consolidated the two cases without objection on April 23, 1996.

On August 12, 1996, the Petitioners and Respondent informed the District Court that only questions of law were at issue, that no material fact disputes existed, and the cases were amenable to summary judgment. (App. 37a). Motions for summary judgment and responses were filed by all parties, and following oral argument the District Court granted the City's motion for summary judgment and entered a final judgment thereon upholding the Ordinance. *J & B Social Club #1, Inc. v. City of Mobile*, 966 F.Supp. 1131 (S.D.Ala. 1996) (App. 35a-52a).

The Petitioners filed a timely notice of appeal to the United States Court of Appeals for the Eleventh Circuit. On May 8, 1998, the Court of Appeals affirmed the judgment of the District Court. *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993 (11th Cir. 1998) (App. 1a-34a).

On May 20, 1998, the Petitioners petitioned for rehearing *en banc* by the Court of Appeals. The Court of Appeals denied Petitioners' request for rehearing. 156 F.3d 188 (App. 77a).

C. The District Court's Opinions.

In denying the Petitioners injunctive relief, the District Court followed *California v. LaRue*, 409 U.S. 109 (1972) and its progeny. (App. pp. 65a-76a). Within that line of cases, the Court stated that the Twenty-first Amendment provided any such regulation an added presumption in favor of its validity. *LaRue*, at 118-119.

Prior to the District Court's consideration of summary judgment motions, the Court rendered its decision in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). In light of the *44 Liquormart* opinion, the District Court concluded the Twenty-first Amendment no longer provides an "added presumption" in favor of the validity of state liquor regulations. The District Court observed that, while the Court in *44 Liquormart* rejected the idea that the Twenty-first Amendment "trumps" the First Amendment in the area of liquor regulation, the Court in *44 Liquormart* upheld *LaRue* and its progeny and provided a "roadmap" for upholding state regulations of adult entertainment in bars. Specifically, the Court cited two cases which validated state regulation of adult entertainment without the presence of alcohol being an issue. *44 Liquormart*, 517 U.S. 484, 515 (citing *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (upholding a zoning ordinance separating "adult" theaters from residential neighborhoods and churches) and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560

(1991) (upholding an Indiana public indecency statute which applied in the context of barroom topless female dancing)).

The District Court applied the *Barnes* analysis, first developed in *U.S. v. O'Brien*, 391 U.S. 367 (1968). This four-part test provides that expressive conduct can be validly regulated if (1) the regulation is a legitimate exercise of authority, (2) furthers an important or substantial governmental interest, (3) the governmental interest is unrelated to the suppression of free speech, and (4) the restriction of First Amendment rights is no greater than necessary to further the government's interest. *Id.*

The petitioners primarily take issue with the District Court rulings that the Mobile ordinance satisfies the second and third prongs of the *Barnes* analysis. The petitioners argue that Mobile must come forth with empirical evidence of "adverse secondary effects" prior to regulating adult entertainment in a barroom atmosphere; otherwise, petitioners contend the regulation is related to the suppression of free speech, or content-based.

Both the District Court and the Eleventh Circuit rejected this argument. The District Court, citing Justice Souter's *Barnes* concurrence, held there is no constitutional requirement that the City make particularized findings regarding adverse secondary effects. The District Court found the City had a "reasonable basis" for believing the ordinance will serve its substantial governmental interest grounded in the experience of other cities, studies done in other cities, caselaw reciting findings on the issue, as well as the city's own wisdom and common

sense. *J & B Social Club #1, Inc. v. City of Mobile*, 966 F.Supp. at 1138. (App. 47a).

D. The Eleventh Circuit's Opinion.

The Eleventh Circuit affirmed the District Court's judgment. *Sammy's of Mobile v. City of Mobile*, 140 F.3d 993 (*see* App. 1a-34a).

The Eleventh Circuit initially noted the Court's validation of regulations, such as Mobile's, in *LaRue, New York State Liquor Auth. v. Bellanca*, 452 U.S. 714 (1981) and *City of Newport v. Iacobucci*, 479 U.S. 1047 (1987), and observed in *44 Liquormart*, the Court reaffirmed the precedential value of *LaRue*, as well as the *Barnes-O'Brien* test. The Eleventh Circuit recognized the Court's explanation that "[e]ntirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations," and, even after *44 Liquormart*, *LaRue* "would come out the same way." *44 Liquormart*, 517 U.S. at 515.

The Eleventh Circuit applied the *Barnes-O'Brien* test and agreed with the District Court that the Mobile ordinance was a constitutionally permitted regulation of expressive conduct.

The Court of Appeals rejected the petitioners' claim that the lack of empirical evidence invalidates the ordinance, finding that Mobile had a "reasonable basis" for believing that its ordinance will serve the substantial governmental interest in avoiding the adverse secondary effects of "nudity and sexually explicit entertainment coupled with alcohol in public places." 140 F.3d at 997. The

Eleventh Circuit assessed the City's basis for the regulation as reasonable and sufficient in that Mobile relied upon the "experience of other cities, studies done in other cities, caselaw reciting findings on the issue, as well as their own wisdom and common sense." *Id.* Under *Barnes* there is not a requirement that a city make particularized findings regarding adverse effects of the combination of alcohol and nude entertainment, and the Court of Appeals considered this Court's observation in *Bellanca* that "[c]ommon sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior." 452 U.S. at 718.

The Eleventh Circuit majority dismissed the petitioners' argument that the Mobile ordinance is "content-based," as a conclusion clearly departing from prior cases holding that regulations such as Mobile's are not aimed at the erotic message of nude dancing, but the adverse secondary effects arising from the combination of alcohol and nude dancing. The Court of Appeals rejected equating *reference* to content with content *suppression*, and applied the *Barnes-O'Brien* intermediate level of scrutiny for regulations which distinguish between nude and clothed entertainment.

The Eleventh Circuit correctly observed that Mobile defends its ordinance as an attempt to combat the secondary effects of nude performance in a barroom atmosphere and concluded that the Mobile ordinance does not seek to ban whatever message is conveyed by nude dancing, or even to ban nude dancing. Indeed, the petitioner Sammy's may, and has since the ordinance was adopted, offer completely nude dancing without the sale of alcohol.

REASON FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE ELEVENTH CIRCUIT'S DECISION IS CORRECT AND NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR OTHER CIRCUIT COURTS.

(1)

The instant case is one of first impression among the circuits. The Eleventh Circuit is the first United States Court of Appeals to consider a governmental regulation of adult entertainment in liquor-licensed establishments since the determination in *44 Liquormart* that such regulations no longer have an added presumption of validity. As such, the Court should not grant the instant petition for a writ of certiorari.[3]

The Court has long upheld regulations prohibiting nude dancers in licensed liquor establishments. *LaRue*, 409 U.S. 109, *Bellanca*, 452 U.S. 714, *City of Newport*, 479 U.S. 92. In *44 Liquormart*, the Court stated that *LaRue* used the Twenty-first Amendment as merely a "buttress" to the conclusion that the First Amendment did not invalidate prohibiting sexual exhibitions in premises licensed to serve alcoholic beverages. 517 U.S. at 515-16. In making those comments, the Court forestalled the view that

---

[3] In denying a petition for writ of certiorari, Justice Frankfurter issued an opinion, stating:

> It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.

Maryland v. Baltimore Radio Show, 388 U.S. 912, 918 (1950).

44 Liquormart was the death knell for prohibiting nude entertainment in bars. By stating that *LaRue* "would come out the same way," in *44 Liquormart*, the Supreme Court also reaffirmed, by citing *Barnes-O'Brien*, that the intermediate level of scrutiny applies to the prohibition of nudity in liquor license establishments rather than the strict scrutiny test advocated by the petitioners.

(2)

The preamble to Mobile's ordinance specifies that the Mobile City Council found that "nudity and sexual conduct . . . , coupled with alcohol in public places, encourages undesirable behavior and is not in the interest of the public health, safety, and welfare." As such, the City Council enacted the ordinance prohibiting this mixture to avoid the disturbances associated therewith. The stated purposes of the ordinance combine elements of combating adverse secondary effects as well as protecting societal order and morality, with only an incidental impact on expressive conduct. Accordingly, the ordinance is content-neutral. *See Barnes*, 501 U.S. at 567-68 (plurality opinion) and 501 U.S. at 582 (Souter, J., concurring in the judgment).

The petitioners misplace reliance on *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), for the proposition that the Mobile ordinance unconstitutionally conditions the conferral of a benefit (a liquor license) on the surrender of a constitutional right (the right to dance nude). The Court rejected this contention in *Barnes*, finding that regulations affecting adult entertainment are constitutional if they satisfy the *O'Brien* analysis. 501 U.S. at 566-67 (plurality

opinion); 501 U.S. at 582 (Souter, J., concurring). The Court has not recognized a fundamental right to unrestrained nude dancing in all settings. *Cf. Young v. American Mini Theatres*, 427 U.S. 50, 79 n. 2 (1976) (Powell, J., concurring) ("The communication involved here [adult movies] is not a kind in which the content or effectiveness of the message depends in some measure upon where or how it is conveyed.").

Further, the petitioners confuse the Court's analysis in commercial speech cases with the content-neutral test for regulations of adult entertainment which incidently affect expressive *conduct*. (Pet. at 27). In *44 Liquormart*, the Court clarified that either the *American Mini Theatres* "time, place and manner" analysis or the *Barnes-O'Brien* test is utilized in considering prohibitions of topless dancing in places where alcohol is served. 517 U.S. at 515. The Court noted, "LaRue did not involve commercial speech about alcohol, but instead concerned the regulation of nude dancing in places where alcohol was served." *Id.*, at 515-16 (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 n. 2 (1995)).

The Mobile ordinance is a content-neutral prohibition of adult entertainment in places where alcohol is served. The Eleventh Circuit properly subjected the ordinance to the *O'Brien* intermediate level of scrutiny set forth in *Barnes*.[4]

---

[4] In *Barnes*, the Court observed that its analysis of "time, place, or manner" regulations of adult entertainment, most recently applied in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), embodies much the same standards as those set forth in *O'Brien*. *Barnes*, 501 U.S. at 566 (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

(3)

The petitioners incorrectly argue, based in large part on their lengthy citation to the Eleventh Circuit's dissent, that the third prong of the *Barnes-O'Brien* test (governmental interest is unrelated to the suppression of free expression) was not satisfied by Mobile's ordinance. The petitioners contend that Mobile's ordinance fails to satisfy this element which subjects the ordinance to the "searching" level of scrutiny applied to content-based laws. Thus, the petitioners' argument goes, the Eleventh Circuit's opinion conflicts with the decisions of the Court.

The Eleventh Circuit held that the Mobile ordinance satisfies the third part of the *Barnes-O'Brien* analysis and ruled the important or substantial governmental interest set forth in the preamble to the ordinance is unrelated to the suppression of free expression. This ruling does not conflict with the decisions of this Court.

On its face, the ordinance is aimed at combating the adverse secondary effects of the mixture of adult entertainment and the sale of alcohol by the drink, which is not at all inherently related to expression. *See Barnes*, 501 U.S. at 585 (Souter, J., concurring). The City's "secondary effects" justification indicates that enforcement of the ordinance against nude dancing in bars is "justified without reference to the content of the regulated [expression]." *Id.*, at 586 (quoting *Renton*, 475 U.S. at 48).

The claim in *Barnes*, as in the instant case, was that the proscription was unconstitutional as applied to nude dancing. The plurality concluded, "[i]t was not the dancing that was prohibited, but simply its being done in the nude." *Barnes*, 501 U.S. at 571. In the instant case, Mobile

"has silenced no message, has invoked no censorship, and has imposed no limitation upon those who wish to view [topless dancing]." *American Mini Theatres*, 427 U.S. at 78 (Powell, J., concurring). The ordinance is addressed only to the places at which this type of expression may be presented, specifically not at those places where alcohol is served, a restriction that does not interfere with content. If Mobile had been concerned with the message purveyed by topless dancing establishments, it would have prohibited them rather than only proscribing topless dancing in a barroom atmosphere. Yet, no party disputes that Sammy's, having surrendered its liquor license, can present topless or completely nude dancing without violating the ordinance. The Eleventh Circuit correctly concluded that "Mobile is attempting only to regulate the sale of alcohol in inappropriate places and it has determined that it is inappropriately sold in places where nude dancing is offered." (App. 10a).

The Mobile ordinance is not intended to suppress the message of nude dancing, or the primary effects of "offensive speech," but rather the negative secondary effects concomitant with the consumption of liquor in such situations. *Cf. Reno v. Am. Civil Liberties Union*, ___ U.S. ___, 117 S.Ct. 2329, 2342 (1997) (purpose of Communications Decency Act of 1996 was "to protect children from the *primary* effects of 'indecent' and 'patently offensive' speech, rather than any 'secondary' effect of such speech" thus Act was content-based (emphasis added)).

The Eleventh Circuit's holding that the Mobile ordinance is unrelated to the suppression of free expression complies with the Court's jurisprudence.

(4)

The Eleventh Circuit found that the Mobile ordinance satisfies the second *Barnes-O'Brien* prong because it furthers an important or substantial governmental interest. In so holding, the Court of Appeals determined that Mobile had a "reasonable basis" for believing its ordinance will serve its substantial governmental interest in avoiding the adverse secondary effects of "nudity and sexually explicit entertainment coupled with alcohol in public places." (App. 7a). The Eleventh Circuit located this reasonable basis "in the experience of other cities, studies done in other cities, caselaw reciting findings on the issue, as well as their own wisdom and common sense." (*Id.*).

Petitioners claim the Eleventh Circuit's conclusion conflicts with the decisions of other circuits. The petitioners contend there is a "dramatic" split among the circuits on the issue of the necessity for governmental entities to establish and support a "legitimate or substantial governmental objective" when enacting legislation prohibiting nudity in bars. (Pet. 24).

The petitioners' contention is unfounded. Quite simply, the directly controlling precedent in the instant case is *Barnes* and *LaRue*. Further, the decisions from several circuits, cited by petitioners, do not conflict with the holding in the instant case and do not contradict the Court's holdings in *Barnes* and *LaRue*. Accordingly, no

conflict exists, either among the circuits or with the Court.

The Eleventh Circuit correctly assessed that the Mobile ordinance is aimed at the very type of harm found to create a substantial government interest in *LaRue* and *Barnes*. (App. 7a). In *LaRue*, the Court found rational the state's conclusion that "certain sexual performances and the dispensation of liquor by the drink ought not to occur . . . " 409 U.S. at 118. In this respect, as the Fourth Circuit recently noted, the Court considered that " '[p]rostitution occurred in and around [topless bars], and involved some of the female dancers' and that '[i]ndecent exposure to young girls, attempted rape, [and] rape itself' also were quite common around such establishments." *Steakhouse, Inc. v. City of Raleigh*, 1999 WL 22978 at *3, No. 97-2341 (4th Cir. Jan. 21, 1999) (quoting *LaRue*, 409 U.S. at 111) (recognized that "nude and topless barroom dancing have a long history of spawning deleterious effects [by] encourag[ing] prostitution and the criminal abuse and exploitation of young women").

Likewise, in *Barnes*, Justice Souter concluded that Indiana's public indecency statute, as applied to nude dancers, served an important governmental interest because such dancing "encourages prostitution, increases sexual assaults, and attracts other criminal activity." 501 U.S. at 582. The plurality determined the statute served Indiana's substantial governmental purpose "of protecting societal order and morality." *Id.* at 568. Again, individualized findings of actual statewide conditions were not present. *Id.* at 582 ("this justification has not been articulated by Indiana's legislature"). Instead, the Court relied on *Renton, American Mini Theatres* and *LaRue* as

citing the adverse secondary effects arising from adult entertainment, as well as the *post hoc* assertion of such adverse effects set forth in Indiana's brief. *Barnes*, at 582-584.

The petitioners argue that a conflict among the circuits exists concerning whether a governmental entity must affirmatively establish a factual basis, or provide evidence, to support its conclusion that important government interests are at stake, and the "motivation for adopting regulations, beyond the mere conclusions stated in the legislation itself." (Pet. 23). The Court has clearly foreclosed this question in *Barnes*. To the extent circuit court cases may have imposed a different requirement, they have been altered by *Barnes*. *See Marks v. United States*, 430 U.S. 188 (1977); *see also DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 410-11 (6th Cir. 1997) (recognizing pre-*Barnes* Sixth Circuit cases were altered by *Barnes* analysis).

Under the Court's opinions in *Barnes*, Mobile need not await localized proof of the secondary effects it seeks to alleviate. Further, the City is not required to come forward with empirical evidence to support its reasonable conclusions that a prohibition against nude dancing in bars serves its substantial governmental interests. As Justice Souter declared:

> Our appropriate focus is not an empirical inquiry into the actual *intent* of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional.
>
> . . . .

> The type of entertainment respondents seek to provide is plainly of the same character as that at issue in *Renton, American Mini Theatres,* and *LaRue.* It is therefore no leap to say that live nude dancing of the sort at issue here is likely to produce the same pernicious secondary effects . . . . In light of *Renton*'s recognition that legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects, the State of Indiana *could reasonably conclude* that forbidding nude entertainment of the type offered at the Kitty Kat Lounge and the Glen Theatre's 'bookstore' *furthers* its interest in preventing prostitution, sexual assault, and associated crimes. . . . I do not believe that a State is required affirmatively to undertake to litigate this issue repeatedly in every case. The statute *as applied* to nudity of the sort at issue here therefore satisfies the second prong of *O'Brien.*

Barnes, 501 U.S. at 582-584 (emphasis added).

Just as the State of Indiana could conclude that "the higher incidence of prostitution and sexual assault in the vicinity of adult entertainment locations results from the concentration of men predisposed to such activities, or from the simple viewing of nude bodies," *Barnes,* 501 U.S. at 586 (Souter, J., concurring), so too could the City of Mobile reasonably conclude that similar results obtain from similar concentrations of crowds in the barroom setting. In fact, Mobile's conclusion is even more reasonable in light of the Court's cases upholding such regulations. *LaRue,* 409 U.S. 109, *Bellanca,* 452 U.S. 714, *City of Newport,* 479 U.S. 92.

In *LaRue*, the Court catalogued the problems arising from liquor-licensed adult entertainment establishments. 409 U.S. at 111. From this, the Court concluded California had a rational basis for its conclusion that a regulation banning adult entertainment in places serving alcohol would further its interest in preventing "bacchanalian revelries." 409 U.S. at 118.

In *Bellanca*, the Court cited with approval the state's legislative memorandum, which is very similar to Mobile's preambulatory clause:

> Common sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior. This legislation prohibiting nudity in public will once and for all, outlaw conduct which is now quite out of hand.

452 U.S. at 717. The Court noted that, if legislative findings were required to uphold the constitutionality of New York's statute banning topless dancing in bars, such findings were satisfied by the purposes set forth in the legislative memorandum. *Id.*

Finally, in *City of Newport*, the City, in its preamble, determined that nude dancing in establishments serving liquor was "injurious to the citizens" of the City. 479 U.S. at 96. The City found the ordinance necessary for a range of purposes, including "prevent[ing] blight and the deterioration of the City's neighborhoods" and "decreas[ing] the incidence of crime, disorderly conduct and juvenile delinquency." *Id.* at 96-97. The Court rejected the Sixth Circuit's conclusion, *Iacobucci v. City of Newport*, 785 F.2d 1354, 1359 (6th Cir. 1986), that "the preamble to the

ordinance, standing alone, is insufficient evidence of the motivating factors in its passage."

Mobile was entitled to rely on the experience and findings of other legislative bodies as a basis for its adoption of its ordinance. There is no reason to believe that the adverse secondary effects of topless dancing in Mobile bars is likely to be different than the effects of such topless dancing in California, New York or City of Newport, Kentucky bars. For that matter, Mobile could reasonably conclude that the negative secondary effects arising from the topless dancing bars in the City of Mobile are similar to the secondary effects arising from topless dancing establishments in Indiana (*Barnes)* or from the adult theaters in Detroit (*American Mini Theatres)* and in Renton, Washington. *See DLS, Inc. v. City of Chattanooga,* 107 F.3d 403, 411 (6th Cir. 1997).

Like the Eleventh Circuit, subsequent to *Barnes* and *Renton,* the Second, Fourth, Sixth, Eighth and Tenth Circuit Courts of Appeals have agreed that governmental entities are not required to produce empirical evidence relating to their interest in ameliorating adverse secondary effects arising from adult entertainment. *See Buzzetti v. City of New York,* 140 F.3d 134 (2d Cir.), *cert. denied,* ___ U.S. ___, 119 S.Ct. 54 (1998); *D.G. Restaurant Corp. v. City of Myrtle Beach,* 953 F.2d 140 (4th Cir. 1991); *DLS, Inc. v. City of Chattanooga,* 107 F.3d 403 (6th Cir. 1997); *Farkas v. Miller,* 151 F.3d 900 (8th Cir. 1998); *Z.J. Gifts D-2, L.L.C. v. City of Aurora,* 136 F.3d 683 (10th Cir.), *cert. denied,* ___ U.S. ___, 119 S.Ct. 162 (1998). Also, prior to *Barnes* and shortly before *Renton,* the Seventh Circuit ruled that a

government need not prove the existence of adverse secondary effects which its legislation is designed to avoid. *Cf. Wall Distrib., Inc. v. City of Newport News*, 782 F.2d 1165, 1169-70 (7th Cir. 1986).[5]

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[5] In upholding a restriction on adult entertainment establishments, with no prior evidence of illegal activity arising therefrom, the Seventh Circuit stated:

> In assessing the reasonableness of local [legislation] . . . , we may not confine the local legislature to only what it knows and can foresee from purely local conditions already experienced. Legislatures can no more be held bound not to know what the whole world knows than can courts; legislative notices of facts must be deemed to run at least as wide as does judicial notice.
>
> . . . .
>
> We therefore assess the reasonableness of the [city's] determination [to regulate adult-oriented businesses] not solely on the basis . . . of what had already demonstrably occurred within its geographical borders, but of what it might reasonably foresee in light of a sufficiently documented wider national experience properly reflected in matters of public record. It would defy common sense to suppose that the [city leaders] are not made aware in this day and time of comparable conditions in other localities, and of the varied responses being made by other local governments to conditions already experienced. We therefore assume that a proper factor in this local legislative determination of governmental interests was what was demonstrably being generally experienced in comparable localities. . . .
>
> To insist that governmental interests justifying such legislation could only be found in specific local experiences and conditions would unrealistically

The cases cited by petitioners are distinguishable from the instant case; and, thus do not support petitioners' proposition that a conflict exists among the circuits. The Third, Fifth and Ninth Circuits have issued decisions, subsequent to *Renton* and *Barnes*, which impose a requirement on governmental entities to produce empirical evidence to justify a regulation of adult entertainment. The cases do not involve the regulation of topless dancing in establishments licensed to sell alcohol.

The Ninth Circuit, in *Acorn Invs. v. City of Seattle*, 887 F.2d 219 (9th Cir. 1989), considered the City of Seattle's ordinance requiring "peepshows" to pay various license fees and to disclose the names and addresses of shareholders. The Ninth Circuit concluded that the City of Seattle failed to produce evidence that the "peepshows" produced adverse secondary effects and thus the city could not show that the licensing scheme furthered a substantial government interest. 887 F.2d at 222.

Acorn Invs. is distinguishable from the instant case. The Seattle ordinance was a licensing scheme, not a regulation of conduct. Further, it is important to note that this Court upheld the City of Renton, Washington's adult theater zoning regulation without particularized findings in the City of Renton, and recognized Renton's reliance on the experiences of Seattle with adverse secondary

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require deliberate subjection to those experiences and conditions before attempting to avoid them.

Wall Distrib., 782 F.2d at 1169-70 n. 7. *See also Postscript Enters. v. City of Bridgeton*, 905 F.2d 223 (8th Cir. 1990) (adopting *Wall Distrib.*'s reasoning in upholding legislation restricting adult movie arcades).

effects of adult entertainment. *Renton*, 475 U.S. at 51-52. Apparently, the Ninth Circuit has required a showing of adverse secondary effects arising from each particular segment of the adult entertainment industry prior to combating those effects, demanding a showing that Seattle "peepshows" have negative effects on a community which has already found that adult theaters have such effects. The Ninth Circuit's ruling is contrary to the Court's holdings in *Barnes* and *Renton*.

The Third and Fifth Circuits found that, while no showing need be made concerning pre-enactment evidence of adverse secondary effects arising from adult entertainment, a city must produce *post hoc* evidence at trial to justify its regulation of adult entertainment. *Phillips v. Borough of Keyport*, 107 F.3d 164, 173-74 (3rd Cir. 1997) (involving an adult entertainment zoning ordinance) and *J & B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362, 371 (5th Cir. 1998) (not cited by petitioners) (involving a ban on public nudity as applied to nude dancers).

The Third and Fifth Circuits are clearly in the minority, as set forth above. Moreover, and more importantly, the Third and Fifth Circuits did not consider a regulation of adult entertainment in a barroom atmosphere.

Consequently, no conflict exists among the circuits on the prerequisites for a municipality to enact a valid prohibition on topless barroom dancing. As stated above, the instant case is the first time this issue has been decided by a Court of Appeals since *44 Liquormart*. The decision of the Eleventh Circuit is consistent with the prior decisions

of the Court, and based on that precedent, the petitioners' First Amendment interests are not violated.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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No. 98-994

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

SAMMY'S OF MOBILE, ET AL., Petitioners,
v.
CITY OF MOBILE, ALABAMA, Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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March 18, 1999

QUESTIONS PRESENTED[1]

1. Whether a local government can adopt an ordinance which is clearly content-based and prohibits expression only as to forms of conduct that are inherently and traditionally communicative?

2. Whether a local government can adopt a content-neutral or content-based form of legislation with a complete failure to establish either the existence or advancement of a legitimate governmental interest, in direct conflict with this Court's decision in *44 Liquormart v. Rhode Island, infra.*?

3. Whether a local government may condition the conferral of a benefit on the surrender of a constitutional right in order to engage in First-Amendment protected activities in direct conflict with the "doctrine of unconstitutional conditions" set forth in this Court's decision in *Perry v. Sindermann, infra.*?

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[1] **The Respondent has disagreed with Petitioners' Questions Presented for Review and simply stated that the sole question presented is whether this Court should exercise its discretion to grant the Petition. The Petitioners will address the Respondents Brief in a fashion responsive to the Questions presented herein.**

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CASE NO. 98-994

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

SAMMY'S OF MOBILE, ET AL., Petitioners,
v.
CITY OF MOBILE, ALABAMA, Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

Petitioners, Sammy's of Mobile, Ltd., et al., respectfully pray that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case, and herein submit their Reply to Respondent's Brief in Opposition.

This Reply to Respondent's Brief in Opposition is arranged in the same sequence as the Respondent's Brief.

I. THE PETITIONERS' REPLY TO RESPONDENT'S ARGUMENT THAT THE PETITION SHOULD BE DENIED BECAUSE THE ELEVENTH CIRCUIT'S DECISION IS CORRECT AND NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR OTHER CIRCUIT COURTS

(1)

In this section of the Respondent's Brief in Opposition, it is suggested that the instant case is one of first impression among the circuits. In beginning the Brief in Opposition at this point, the Respondent has elected to combine all sections presented in the Petition, including those that focused on the necessity for local governments to establish and support a "legitimate or substantial governmental objective" when enacting legislation affecting speech.

Contrary to the footnote quoting Justice Frankfurter (citing *Maryland v. Baltimore Radio Show,* 388 U.S. 912 (1950)), if, in fact, "[W]ise adjudication has its own time for ripening," that time is now, and it is incumbent on this Court to clarify the "secondary effects doctrine" and reconcile the confusion which has been created by the many courts, both state and federal, that have attempted to evaluate and apply the *Barnes* decision.[1] Add to this the dimension created by this Court's decision in *44 Liquormart*,[2] and it is clear that these issues, as articulated in the Petition, call out for analysis and reconciliation.

The Respondent, apparently trying to ignore this Court's decision in *44 Liquormart*, simply makes the statement that "The Court has long upheld regulations prohibiting nude dancers in licensed liquor establishments," and regurgitates a number of decisions that all predate *44*

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[1] *Barnes v. Glen Theatre*, 501 U.S. 560 (1991).

[2] *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996).

Liquormart. The Respondent then makes the bold assertion that, since this Court indicated that the decision in *LaRue*[3] "would come out the same way," the impact of *44 Liquormart* would justify a decision in the instant action that is in direct contradiction with the holding in *44 Liquormart*.

Factually, the distinctions between the vast evidentiary hearings, testimony, and extensive empirical record which underscored the legislation at issue in *LaRue* (as well as virtually every other case relied on by the Respondent) must be contrasted to the absolute lack of any evidence, whatsoever, promulgated in support of Mobile's challenged legislation. It is clear that the challenged legislation would not satisfy the most *basic* scrutiny, since it had *no* evidentiary basis for its adoption, and the only evidence presented established that the Petitioners' businesses *did not* cause any "adverse secondary effects." Vague references in the preamble of the legislation simply do not justify the expansive restrictions and chilling effect on free speech imposed by the challenged legislation.

(2)

When a concept as important as free speech is at issue, it would be entirely unacceptable to allow the government to restrict free speech on the basis of a "knee-jerk" recitation of "public health, safety and welfare" concerns. Indeed, the points and authorities cited both in the Petition and herein reject such a mere recitation as a legitimate basis for legislation.

A recent decision issued by the Supreme Court of the State of Pennsylvania, *Pap's A.M. v. City of Erie*, 719 A.2d 273 (Pa. 1998), illuminated many of the arguments asserted by the Petitioner. In the *Pap's* case, a "public indecency ordinance" was analyzed under the framework of the *Barnes*

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[3] *California v. LaRue*, 409 U.S. 109 (1972)

decision. The Pennsylvania Supreme Court held that there was significant confusion as to how the *Barnes* decision should actually be applied.[4]

It must be emphasized that the recent *Pap's* decision supports the Petitioners' position that the absence of any evidence presented to or by the City of Mobile to justify the legislation at issue in the instant caseis clearly problematic:

> "We acknowledge that one of the purposes of the Ordinance is to combat negative secondary effects. That, however, is not its only goal. Inextricably bound up with this stated purpose is an unmentioned purpose that directly impacts on the freedom of expression: that purpose is to impact negatively on the erotic message of the dance." *Pap's A.M. v. City of Erie,* 719 A.2d 273, 279 (Pa. 1998).

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[4] "It is simply not possible to find that Justice Souter's position in Barnes commanded five votes. Even if we were to assume arguendo that his concurring opinion provided an approach which was "narrower" than, and yet still encompassed by and consistent with, the one taken by the Chief Justice, such a concession would provide only four votes for Justice Souter's position. The fifth vote for Justice Souter's position is not forthcoming. It cannot be provided by Justice Scalia, who believed that restrictions on nude dancing are not to be analyzed pursuant to the First Amendment. Nor can it be said that the dissenters, who rejected the notion that the state's goal of combating secondary effects via the statute rendered the statute content-neutral, were in agreement with Justice Souter. We find that the Commonwealth Court's determination that Justice Souter's "secondary effects" rationale represents the "holding" of Barnes is simply not borne out. In fact, aside from the agreement by a majority of the Barnes Court that nude dancing is entitled to some First Amendment protection, we can find no point on which a majority of the Barnes Court agreed. Thus, although we may find that the opinions expressed by the Justices prove instructive, no clear precedent arises out of Barnes on the issue of whether the Ordinance in the matter sub judice passes muster under the First Amendment." *Pap's*, 719 A.2d at 278.

As will be shown in the following section, the confusion over the necessity of a governmental body to establish the existence of "adverse secondary effects" obscures any clear-cut distinctions between the application of a "searching" level of scrutiny or a lesser standard.

(3)

In this section of the Respondent's Brief, a lengthy criticism of the Petitioners' arguments and the points raised in the Eleventh Circuit's dissent are unpersuasive. The Respondent attempts to convince this Court that the City of Mobile's legislation was not intended to have any impact on the message of exotic dancing. The Respondent submits that since the legislation was aimed at the "adverse secondary effects" of the Petitioners' businesses, and was "attempting only to regulate the sale of alcohol in inappropriate places," the Mobile ordinance was unrelated to the suppression of free expression. This position is belied by the fact that, as stated in the Respondent's footnote 2, "Mobile has repeatedly stated it only intends to enforce the ordinance against topless bars."

This type of an admission makes clear the fact that the primary motive of adopting the ordinance was to destroy the specific type of business operated by the Petitioners, specifically, a business created, licensed, and developed to present expressive dance performances *in conjunction with* the sale of alcoholic beverages. As stated at the public hearings held pursuant to the adoption of the ordinance, the operation of these types of businesses caused no adverse secondary effects, a fact which casts significant doubt on the sincerity of the City of Mobile's stated goals.

Since the City of Mobile has admitted that the legislation at issue would only be enforced against businesses like the Plaintiffs', the City of Mobile cannot look to the *Barnes* decision as insulation from the constitutional

infirmities inherent in this legislation, and it must be concluded that, as stated by the Eleventh Circuit dissent, Mobile's ordinance is clearly content-based.[5]

As will be emphasized in the next section, the Eleventh Circuit majority has ultimately asserted that no empirical evidence, whatsoever, is necessary to justify the adoption of an ordinance such as that passed by the City of Mobile. Indeed, their holding would allow mere "common sense" to serve as the basis for such legislation. If an individual in a free society is to be forced to accept a restriction on his or her freedom, it should be an absolute requirement that any governmental body imposing such a restriction prove that the "benefit" of any restriction or censorship is far more than simply "theoretical." Clearly, this can never be tested if the basis for such an ordinance is mere "common sense." The City of Mobile had absolutely no basis to support it's ordinance and, if the City argues that it was based on "common sense," this is only a matter of opinion that should never be accepted as the basis for a restriction impacting speech.

(4)

In this portion of Respondent's Brief, the sharp focus is brought to perhaps the most troubling aspect of the Eleventh Circuit majority opinion. Specifically, this is contained in that portion of the Eleventh Circuit decision which apparently found that the Mobile ordinance satisfied the

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[5] This admission, which was stated in footnote 2 on page 3 of the Respondent's Brief, specifically states "The case at bar arose in the context of a pre-enforcement challenge. Mobile has repeatedly stated it only intends to enforce the ordinance against topless bars. Accordingly, the District Court declined to consider an overbreadth challenge because it is not yet ripe, citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 503 n.1 (1982) and *Poe v. Ullman*, 367 U.S. 497 (1961)."

"second *Barnes-O'Brien* prong because it furthers an important or substantial governmental interest." The Respondent's Brief continues to state that, "In so holding, the Court of Appeals determined that Mobile had a "reasonable basis" for believing its ordinance will serve its substantial governmental interest in avoiding the adverse secondary effects of "nudity and sexually explicit entertainment coupled with alcohol in public places." (Respondent's Brief, page 14).

This is simply not supported by the record in the instant case, and the greatest problem lies in the erroneous conclusion that "the Eleventh Circuit located this reasonable basis" in the experience of other cities, studies done in other cities, case law reciting findings on the issue, as well as their own wisdom and common sense." As emphasized in the Petition, when the City of Mobile adopted its ordinance there was *no evidence* related to the "experience of other cities," *no evidence* regarding "studies done in other cities," *no* discussion or recitation of "case law reciting findings on the issue," and no basis asserted, whatsoever, other than the Twenty-first Amendment. *44 Liquormart* dramatically changed the "knee-jerk" justification for such legislation by simply relying on the Twenty-first Amendment.

Without belaboring the issue, there *is* a dramatic split among the Circuits on the issue of the necessity for governmental entities to establish and support a legitimate or substantial governmental objective when enacting legislation "prohibiting nudity in bars," the issue as framed by the Respondent.

The significant issues which were addressed, but not resolved in the *Barnes* decision are clearly emphasized by the Respondent. Regardless of the instructive advice as to how to discern a coherent statement of the law from a complex opinion such as *Barnes* (even when analyzed under *Marks v. United States,* 430 U.S. 188 (1977)), history has shown that

the application of the *Barnes* decision has resulted in confusion, an inconsistent application of judicial interpretations, and the opportunity for content-based abuses. These abuses are made possible when the necessity for justification of the governmental restrictions on free speech are foreclosed. If the Respondent's position is correct, and the Eleventh Circuit's majority opinion is upheld, then the many legal scholars identified in the law review articles cited in the Petition will have to acknowledge that their greatest fears regarding the misapplication of the "adverse secondary effects doctrine" have become a reality.

Many of the cases relied upon by the Respondent identify this problem with great clarity. In *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 410-11 (6th Cir. 1997), *Buzetti v. City of New York*, 140 F.3d 134 (2nd Cir.) *cert. denied*, ____ U.S. ___, 119 S.Ct. 54 (1998), *D.G. Restaurant Corp. v. City of Myrtle Beach*, 953 F.2d 140 (4th Cir. 1991), and *Farkas v. Miller*, 151 F.3d 900 (8th Cir. 1998), there was evidence presented to justify and support the adoption of the respective legislation in these cases.

In *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683 (10th Cir.), cert. denied, ___ U.S. ___, 119 S.Ct. 162 (1998), the Tenth Circuit reversed a district court finding that even though the City of Aurora had presented evidence of adverse secondary effects engendered by businesses significantly different than the one operated by the plaintiff in that action, such evidence was still sufficient to support the justification for the ordinance. Nonetheless, the Circuit Court emphasized that the City of Aurora did not "seek to justify its actions with a completely barren record." *Id.* at 690.

Citing *Discotheque, Inc. v. City Council of Augusta,* 264 Ga. 623, 449 S.E.2d 608, 609-10 (1994) (summary judgment improper in favor of City where City produced no probative evidence of experience of other municipalities

regarding negative secondary effects of sexually oriented businesses), and *Quetgles v. City of Columbus,* 264 Ga. 708, 450 S.E.2d 677, 678 (1994), *cert. denied,* 514 U.S. 1083, 115 S.Ct. 1794, 131 L.Ed.2d 722 (1995) (same), it is clear that a "barren record," which was all the City of Mobile had to support its ordinance, is not sufficient.

It should be clear to the Court that the confusion suffered by courts attempting to apply the *Barnes* decision, the apparent reliance on *Barnes* by the Circuit Courts to justify entirely different and inconsistent theories, and the clear conflict that exists (a conflict clearly established even by the Respondent's citation of authorities), justifies the granting of the instant Petition. Indeed, if the Court reviews the decision in *Pap's*, and reviews the decision *in J&B Entertainment, Inc. v. City of Jackson* at 152 F.3d 362 (5th Cir. 1998),[6] it is clear that the importance of the issue,[7] the troubling conflicts between the Circuits, and the other issues cogently addressed in the Petition, all indicate that it would be appropriate for this honorable Court to grant the Petition, review these issues, and provide the much needed guidance and reconciliation that this Court was designed to provide.

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[6] This decision again went through a lengthy analysis of the "fragmented Supreme Court" in *Barnes*, and made a strict finding that any conclusion that a government does not need to introduce evidence to justify an ordinance regulating public nudity challenged on First Amendment grounds was blatantly erroneous.

[7] Both the Petitioners and their Counsel would respectfully submit that nothing in this Country is as important as the First Amendment.

CONCLUSION

Petitioners, Sammy's of Mobile, Ltd., et al., respectfully pray that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case. Clearly, the issues involved in this action go far beyond the mere facts of the instant case, and provide this Court with the unique opportunity to reconcile the misapprehensions suffered by the many state and federal courts attempting to interpret the holdings in *Barnes v. Glen Theatre* and *44 Liquormart* in a way that does not lead to the absence of "equal justice under the law." Regardless of the scrutiny applied, it is clear that this Court can provide much needed guidance in an unsettled and controversial area of First Amendment jurisprudence by granting the instant petition for writ of certiorari.

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March 18, 1999